APPROPRIATE ROLE OF FOREIGN JUDGMENTS IN THE INTERPRETATION OF AMERICAN LAW

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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THURSDAY, MARCH 25, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:04 a.m., in Room 2141, Rayburn House Office Building, Hon. Steve Chabot, (Chair of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order. I'm Steve Chabot, the Chairman of the Subcommittee on the Constitution. We welcome the panel here this afternoon, and I recognize myself for the purpose of making an opening statement.

Article IV of the Constitution clearly provides that "This Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land." However, today an alarming new trend is becoming clear: Judges, in interpreting the law, are reaching beyond even their own imaginations to the decisions of foreign institutions to justify their decisions.

This hearing on H. Res. 568 will explore the appropriateness of citations to foreign authorities for the interpretation of American law. H. Res. 568 was introduced by Representatives Feeney and Goodlatte, and it is currently cosponsored by myself, Mr. King, and many other Members of the House Judiciary Committee and some 60 other Members of Congress. It expresses a sense of the House that judicial determinations regarding the meaning of the laws of the United States should not be based on pronouncements of foreign institutions unless such foreign pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.

In an October 28, 2003 speech, Supreme Court Justice Sandra Day O'Connor stated, "I suspect that over time, the U.S. Supreme Court will rely increasingly on international and foreign courts in examining domestic issues." Justice O'Connor's prediction follows an already disturbing line of precedents in which the U.S. Supreme Court in several recent cases has cited decisions by foreign courts and treaties not ratified by this country to support their interpretations of the United States Constitution.

As one commentator has written, "The use of international sources and cases involving purely domestic concerns is alien to the American legal system historically and, if unchecked, will produce a further erosion of American sovereignty in addition to the mischief already done by these cases." Indeed, the Declaration of Independence itself announced that one of the chief causes of the American Revolution was that King George had "combined to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws."

In *Lawrence* v. *Texas*, the recent decision striking down a Texas statute prohibiting same-sex sodomy, Justice Kennedy, writing for a majority, cites for support a decision by the European Court of Human Rights allowing homosexual conduct as evidence of a lack of world consensus on the illegality of such conduct. Whatever one's views on that issue, it should be evident that the relevant consensus behind American law is not a world consensus, but rather the consensus of those in the United States on the meaning of the words used in the Constitution and legislation when originally enacted.

As Justice Scalia stated in his dissent in *Lawrence*, "The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is meaningless dicta, dangerous dicta, however, since this Court should not impose foreign moods, fads, or fashions on Americans."

Two years ago, in the majority opinion in *Atkins* v. *Virginia*, Justice Stevens struck down laws allowing the mentally retarded to be sentenced to death on the grounds that "the practice has become truly unusual, and it is fair to say that a national consensus has developed against it." Strikingly, the footnote following that sentence, presumably to support the proposition of a national consensus, cites to the views expressed in the brief filed in the case by the European Union. This was, no doubt, a desperate means of hiding the fact that no such national consensus existed as the laws of 20 of the 38 States allowing capital punishment at the time allowed such executions.

In *Grutter* v. *Bollinger*, which upheld the use of racial preferences in university admissions, Justice Ginsburg, in a concurrence joined by Justice Breyer, began by noting with approval that the International Convention on the Elimination of All Forms of Racial Discrimination allows the theoretically temporary maintenance of unequal or separate rights for different racial groups. She then cited analogous provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, which, Justice Ginsburg noted in a speech a few weeks later, "Sadly the United States has not ratified." As commentator Stuart Taylor, Jr. has written, "If an international agreement that the United States has refused to ratify can be invoked as a guide to the meaning of the 136-year-old 14th amendment, what will be next? Constitutional interpretation based on the sayings of Chairman Mao? Or Barbra Streisand?"

The citation of foreign judgments in opinions by American judges is far out of the mainstream. Even Drew Days, former U.S. Solicitor General under the Clinton Administration, when asked about

the Supreme Court's citation to a foreign authority in *Lawrence*, confessed that, "It surprised me to see it in a majority opinion."

Americans, of course, are not subject to the dictates of one world government, but increasingly Americans are subject to the decisions of the United States Supreme Court that are based, at least in part, on selectively cited decisions drawn by a variety of foreign bodies. Americans' ability to live their lives within clear constitutional boundaries is the foundation of the rule of law and essential to freedom. There is no substitute for the unadulterated expression of the popular will through legislation enacted by duly elected representatives of the American people. The foundation of liberty turns to sand, however, when American must look for guidance not only to duly enacted statutes by elected legislatures and to decisions of American courts faithfully interpreting those statutes, but also to the often contradictory decisions of hundreds of other organizations worldwide.

I look forward to hearing from all the witnesses here this afternoon, and the Ranking Member is not yet here; but, Mr. Schiff, I don't know if you wanted to make an opening statement on behalf of the minority.

[The prepared statement of Mr. Chabot follows:]

PREPARED STATEMENT OF THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Article VI of the Constitution clearly provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." However, today an alarming new trend is becoming clear: judges, in interpreting the law, are reaching beyond even their own imaginations to the decisions of foreign institutions to justify their decisions.

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Americans, of course, are not subject to the dictates of one world government. But increasingly, Americans are subject to the decisions of a United States Supreme Court that are based, at least in part, on selectively cited decisions drawn from a variety of foreign bodies. Americans' ability to live their lives within clear constitutional boundaries is the foundation of the rule of law, and essential to freedom. There is no substitute for the unadulterated expression of the popular will through legislation enacted by duly elected representatives of the American people. The foundation of liberty turns to sand, however, when Americans must look for guidance—not only to duly enacted statutes by elected legislatures and to decisions of American courts faithfully interpreting those statutes—but also to the often contradictory decisions of hundreds of other organizations worldwide.

I look forward to hearing from all our witnesses today.

Mr. SCHIFF. Mr. Chairman, thank you. I'm just going to make a brief comment that doesn't as much go to the nature of this specific issue, but something as I see it as a trend that concerns me, and that is the deterioration of the relationship between the Congress and the courts. I think we need to work on strengthening the bonds between our two coequal branches of Government, and through a number of actions that the House has taken the last several years, I think we have strained the bonds of comity between the Congress and the courts. And I would hope that when issues like this come up, that there is every opportunity given to receive input from the Judicial Conference, that we in the appropriate way and through the appropriate channels try to ascertain the impact of our decisions on the Judiciary and treat the Judiciary as a coequal branch in recognizing their unique role in our form of Government.

So I would hope that in our discussion of this issue and any other that we will work to facilitate that relationship and not further degrade it. Several of us have been working on establishing a new caucus within the Congress that's designed to improve communication between the Congress and the courts where we antici-

pate working closely with the justices, with the courts of appeals, with the State courts to try to improve the quality and the quantity of dialogue between our branches, and I didn't want to let this opportunity go by without raising my concern over the changing nature of the dialogue or lack of dialogue between our branches in the hope that we show an appropriate deference and respect to the Judicial Branch.

And I yield back the balance of my time.

Mr. CHABOT. Thank you very much.

Would the gentleman from Florida who is one of the two principal sponsors of the legislation like to make an opening statement?

Mr. FEENEY. Thank you very much, Mr. Chairman.

In addition to Congressman Goodlatte, Congressman Ryun, and Congressman King, I have been very interested in this, as you have, Mr. Chairman. I want to associate myself with the comments of Mr. Schiff. I do believe it's important that we have a great deal of comity between the three branches. I also think it's important to have a dialogue, as he suggested. One of the ways, not the only one way we have dialogues, is through sending resolutions from the Congress, and so I hope we can have an enlightened discussion about this issue.

I would also hope that we recognize the importance of an independent judiciary, but we ought to understand independence of the judiciary in its proper constitutional context. The judiciary should never have been independent of the Constitution or the laws of the United States themselves, because they give the foundation for the legitimacy for the judiciary in the first place.

One of the things I would like to point out, Mr. Chairman, if I could, at the outset is what this resolution doesn't do. This resolution specifically doesn't say the courts can't use foreign laws when interpreting, for example, treaties or understandings between different States. It also basically would never prohibit a court from using the legislative intent for a congressionally-enacted statute. If we look to Germany for its health care laws or France for its education laws, for example, certainly it would be appropriate in divining the intent of the Congress to look into foreign issues that informed the creation of the legislation itself; and, finally, it doesn't prohibit any court from ever looking at foreign laws as long as those laws inform an understanding of the original meaning. What it would do is to suggest, of course, that they could not look at, for example, a recently enacted statute or a recently enacted constitution overseas to interpret a constitutional provision that may be 215 years old, for example.

As the Chairman pointed out, increasingly Federal judges, including six United States Supreme Court justices, have expressed, in my view, disappointment in the original constitutional text that we inherited from our framers. In certain times, they have expressed disdain for laws enacted by democratically elected representatives. With disturbing frequency, they have simply imported new laws from foreign jurisdictions looking for more agreeable laws or judgments in the approximately 191 recognized countries throughout the world. They championed this practice and fancied themselves players on the international scene of juris prudential thought.

And while we are not condemning in this resolution any specific decision, we have looked not only to the decisions that the justices have issued increasingly in the last 15, 20 years, but also their comments off the bench which are very, very important to understand. The framers of our Constitution never suggested that we should be an island unto ourselves. We have the treaty power. We have the ability of the legislature to look to overseas laws and proposals. We've incorporated much of English and western civilizations' common law in our laws. We have provisions, under article I, that Congress can take the power to remedy offenses against the laws of foreign nations. But nowhere in the constitutional text ever does it suggest that we can have courts import foreign laws or foreign constitutional propositions.

Madison basically said in '47 when he quoted Monesque, "Where the powers of judging join with the legislative, the life and liberty of the subject would be exposed to the arbitrary control for the judge who would then be the legislator." One of the problems we have with importing foreign law that's never been ratified by any of the political branches, the elected branches, is that judges have enormous discretion. There are some 191 recognized countries by the United States State Department, and how is a judge, if this is an appropriate process, to discern which of the countries is appropriate to cite and which of the countries is not, one of the things that some of the witnesses, I think, will address today.

I note that Justice Breyer's speech to the American Society of International Law 97th Annual Meeting, April 4 of 2003, encouraged all of the professors and all of the lawyers and all of the law students to go out and research all of the international law, because he said the Supreme Court was incompetent because of the overwhelming body of constitutional law and statutory law to understand what all of these 191 nations are doing, and I agree with them. They are not competent to do so, but I also would suggest to him that it is inappropriate for them to be encouraging lawyers to come before them and do this.

Finally, citing Justice Breyer in that speech, he ends by talking about what an exciting revolution this is, and I quote him: "What could be more exciting for an academic practitioner or judge than the global legal enterprise that is now upon us? Wordsworth's words written about the French Revolution will, I hope, still ring true." In quoting, and this is Wordsworth's great poem about the French revolution: "Bliss was it in that dawn to be alive, but to be young was very heaven."

Well, my recollection about the aftermath in much of the French Revolution is that there was very little liberty as a result and much bloodletting. I'm here to defend the Constitution and liberty.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you.

I would also like to announce that all Members will have five legislative days to submit additional material for the record, and without objection, I will at this time submit for the record a written statement by Congressman Jim Ryun, who has also been a leader in this effort.

[The prepared statement of Mr. Ryun follows:]

PREPARED STATEMENT OF THE HONORABLE JIM RYUN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF KANSAS

MR. RYUN. Mr. Chairman, I appreciate your decision to hold this important hearing. The disturbing trend of the Judicial Branch utilizing foreign and international laws in deciding legal cases must come to an end. I firmly hold that this practice is dangerous and undemocratic. I would encourage the Judiciary Committee to report H.Res.568 out of Committee and for the House to pass this important resolution.

In November 2003, I introduced a similar resolution, H. Res. 446, the Constitution Preservation Resolution, calling on the Supreme Court to stop using international law in its decisions. I saw the Supreme Court's increasing reliance on international law as a threat to the oldest democracy in the world and I stepped forward and took the lead on condemning their actions.

I am pleased that my fellow legislators, Congressmen Feeney and Goodlatte, came together in sponsoring this bill which is substantially similar to original legislation and that will effectively communicate to the Judicial Branch that international law has no place in its decisions.

Justice Antonin Scalia has been a leading advocate against this trend. In a dissenting opinion on Thompson v. Oklahoma he denounced the Court's plurality's reliance on international practice as "totally inappropriate." He argued, "The views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution." However, this is occurring in greater frequency.

In the *Lawrence* v. *Texas* anti-sodomy case, the Supreme Court majority relied on a series of decisions by European courts on the same issue. Justice Anthony Kennedy wrote the majority opinion of the court, in which he cites and makes reference to international law four times. Kennedy specifically says that the European Court of Human Rights has rejected the law being debated in *Lawrence* v. *Texas*. He goes on to say that since there is no "legitimate or urgent" reason in other countries for this law, the United States has no reason either.

In *Akin* v. *Virginia*, the Supreme Court noted that the world community overwhelmingly disapproved of executing the mentally retarded, and therefore found the practice unconstitutional.

In *Grutter* v.*Bollinger*, Justices Ruth Bader Ginsburg and Stephen Breyer cited the International Convention on the Elimination of All Forms of Racial Discrimination in their concurring opinion.

In *Knight* v. *Florida*, Justice Steven Breyer, in deciding a case focusing on allowable delays of execution, said he found "useful" court decisions on the matter in India, Jamaica and Zimbabwe.

The Court's usage of international law and opinions in decisions is completely incompatible with our democratic values and the proper role of the courts in our constitutional system. The American people have had no opportunity to vote on any of these laws, and, in fact, many international laws are often developed by United Nation bureaucrats, without any democratic input.

International law has no more place in our courts than foreign countries have in our elections. Foreign countries are expressly prohibited from influencing our elections. However, the Supreme Court, in using the laws passed by these countries to interpret and rewrite American laws, are achieving the same result—foreign interference in our government.

The Supreme Court holds an important role in the Government as defined in the Constitution. However, this is not the role it is defining for itself. Judge Robert Bork said, "If the views of foreign nations are relevant, they should be relevant to legislative debates, not in judicial interpretations of the Constitution." The Courts are overstepping their Constitutional boundaries. This Congress must keep the Court in check and pressure the Court to conform to its Constitutional role to decide cases based on the Constitution, not foreign laws or world opinion.

Mr. CHABOT. I'd now like to recognize the gentleman from Iowa, Mr. King, who is also a cosponsor and leader in this effort.

Mr. King.

Mr. KING. Thank you, Mr. Chairman, and I thank you for holding this hearing today, and I'd like particularly to thank Congressman Feeney and Congressman Goodlatte, but in particular Congressman Feeney, who I believe has in the brief time I've been in this room delivered a lot of what needs to be said about this issue.

And I would take it back to, and I don't know that it's been quoted specifically in opening remarks to this point, but article VI, and I would go so far as to say that not only should the courts not be considering foreign decisions, but also that the Constitution suggests to the contrary in that in article VI states, and I quote: "This Constitution and the laws of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby"—and I would emphasize this—"anything in the Constitution or laws of any State to the contrary not withstanding."

I'll argue that our founders did not consider the concept of taking a look at foreign law with the exception of the common law and the references made by Mr. Feeney, and if they had considered a scenario of today, they would have considered also inserting the language "anything in the Constitution or laws of any State or country notwithstanding."

So that's my specific argument, and to me it's just simply unbelievable that a Supreme Court justice would reference Zimbabwe. It violates the whole concept that I come to this with, and that is I'm seeing this activism, and I want to delve into that just a little bit, in that this, I will argue, is step one. The Constitution gives the Congress the authority and the responsibility to establish, and clearly establish, the separation of powers between the Legislative and Judicial Branch of Government, and it really isn't the Court's fault entirely that we are to this point where we have an activist court that's taken over so much authority from the Legislative Branch.

I would argue that a year ago that the line between the separation of powers has been blurred by an activist court from the top all the way down through the system. Today, I'll tell you the line has been obliterated and by a number of different decisions. They have sent this message to this Congress that we will be dealing with whatever they let us deal with, but when I read the Constitution, it establishes that the Court will deal with whatever the Congress lets them deal with, with the exception of those specific responsibilities that are within the Constitution, and we know what they are, and the specific court, the Supreme Court, which is in the Constitution.

So I think we've got a lot of work to do here, and I don't know that we have to do it in a radical fashion. I think we need do it in a step-by-step fashion, this being step one, and to send this resolution to limit the courts to the directions that Mr. Feeney has described here this morning, and I think we need to follow along with that and do a number of other things to brighten this line of the separation of powers.

And another thing that I am concerned about is the activism that's being taught within our law schools today, the young people that believe that it is their job to go out and amend this Constitution by every opportunity of litigation that they have, and that kind of activism in the end tears this Constitution asunder, and the question that we need to get answered is if we are going to go down the path of activism, judicial activism, that sees the future of America in a fashion that's not accountable to the voice of the people, like we have to be, if we go down that path, what does the

Constitution mean? What value has it? What is left of it that we can rely on, this Constitution that was established for liberty and for freedom and to ensure the rights of the minority as well as the majority?

So that's my concern, and I'll pose this question: What's left of the Constitution if we amend it piece by piece by piece? Is it simply then a document that's gotten us from 1789 to this point where we can be enlightened and move forward and develop our society and race us into the future at the direction of the courts, or is it a Constitution that's established to protect the rights of the minority and protect the timeless individual human rights that are denoted by our founding fathers?

So I see this as a step along the way. Again, I thank all of the people that are principals involved in this resolution and the Chairman.

And, Mr. Chairman, I yield back the balance of my time.

Thank you.

Mr. CHABOT. Thank you.

Would the gentleman from Indiana like to make an opening statement?

[Mr. Hostettler gestures in the negative.]

Mr. CHABOT. Thank you.

At this time, I'd like to introduce our very distinguished panel here this morning, and our first witness is Jeremy Rabkin, Professor of Government at Cornell University where he teaches courses on international law and American Constitutional history. He received his B.A. from Cornell and his Ph.D. in political science from Harvard.

He has written widely on the emerging strains between American Constitutional principle and the current trends in international law. His book, "The Case for Sovereignty", will be published by AEI Press this spring, and a longer study, "Law Without Nations, Why Constitutional Government Requires Sovereign States", will be published by Princeton University Press at the end of this year.

And we welcome you here this morning.

Our second witness is Professor Vicki Jackson of the Georgetown University Law Center. Professor Jackson is a graduate of Yale and Yale Law School. She has served as a law clerk to U.S. Supreme Court Justice Thurgood Marshall and was a Deputy Assistant Attorney General in the Office of Legal Counsel in the U.S. Department of Justice under the Clinton Administration.

She is coauthor with Professor Mark Tushnet of a course book on "Comparative Constitutional Law" and serves as an articles editor for ICON, the International Journal of Constitutional Law.

And we welcome you here this morning, Professor.

Our third witness is Michael Ramsey, professor of law at the University of San Diego School of Law. Professor Ramsey is a graduate of Dartmouth and Stanford University Law School. He has clerked for Justice Scalia of the U.S. Supreme Court and practiced law with Latham & Watkins in San Diego. Professor Ramsey teaches Constitutional law and foreign relations law.

And we welcome you here, Professor.

And our fourth and final witness this morning is John McGinnis, professor of law at Northwestern University. Professor McGinnis earned his B.A. and J.D. from Harvard and his M.A. from Oxford University. He then clerked for Judge Kenneth W. Starr on the U.S. Court of Appeals for the District of Columbia. From 1987 to 1991, Professor McGinnis was Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice.

So, as I said, we have a very distinguished panel here this morning, and we welcome all of you. We'll begin with Professor Rabkin. I might mention that we have, as you're probably aware of, a lighting system. We'd ask that you confine your testimony if possible, to 5 minutes. We'll give you a little leeway, but if you could perhaps do that. The yellow light will come on when there is 1 minute to go, and then when the red light comes on, if you could wrap up at that time, we'd appreciate it.

We'll begin with Professor Rabkin. You'll need to turn the mike on there.

STATEMENT OF JEREMY RABKIN, PROFESSOR OF GOVERNMENT, CORNELL UNIVERSITY, ITHACA, NY

Mr. RABKIN. Thank you.

First I want to congratulate the Committee. I do think this is a very important issue, and I'm very grateful to you for calling attention to this.

Since I'm starting off, I'm going to approach this in the most general way, but I think it's the big picture that's important for us to hold on to. It's certainly true that you can find examples of American court decisions, Supreme Court decisions, citing what foreign jurisdictions have done, but to my knowledge, almost all of the cases like that, if you go back to earlier times, deal actually with international issues, and I think at the heart of this controversy that we're having now is does international any longer correspond to some defined limited body of law which we can say, no, okay, that's the international, and the rest is ours?

The very term "international" was coined, as it happens, in 1789 by Jeremy Bentham, and what he—the reason he coined this phrase, he wanted to emphasize we're talking about, as he said, a law that involves the relations between sovereign states and therefore it is international; it is between nations. Once you have U.N. human rights conventions that purport to lay down standards about a whole wide range of things, should we have comparable worth for women workers, should children have the right to receive any kinds of reading materials they like, all kinds of things are now dealt with in U.N. convention, and it no longer corresponds in any way to things that are international.

What we do in the United States, for example, on questions that involve women or feminist issues or, as in the Texas case, sexual freedoms, this has no direct relation to anything that happens in a foreign country. We aren't going to do it differently because they do it differently. We do not need to coordinate. There is no treaty there, or, indeed as Justice Ginsburg mentioned, there is a treaty, but we haven't ratified it. So why can't we just have our own country? And the thing you have to keep in mind is a lot of people are now saying, "Well, since there are treaties, it doesn't matter wheth-

er the United States has actually ratified them because there is customary international law." And what is customary international law? And if you look at a lot of law review articles, a lot of treatments, this is what those law students are being taught now. Customary international law is not what it used to be, which is what countries actually do in their relations with each other, but just what a lot of countries do. So you can start adding up how many countries say this, and if enough of them do, you can say in some general way that represents the view of the world community. Of course what that means is we no longer have our own Constitution.

I make one point in my prepared testimony which I want to elaborate just briefly in the 2 minutes that remain to me. When you say world government, people roll their eyes and say don't be silly; we're not talking about world government. Okay. We're not talking about world government. What are we talking about? We're talking about coordination among judges. We certainly are talking about that. Now, what does that mean? It means that judges in different countries will buck each other up, reassure each other, lend each other moral authority by saying, yes, we all do this; yes, all over, yes; we're the world community.

You don't need to talk about recent disputes between, say, Europe and the United States over Iraq or how to deal with terrorism. You don't need to call them surrender monkeys, but just focus on this for a minute. This model in which you can have judges dialoguing with each other and changing their national laws is something which they find very appealing in Europe because that is what the EU is. It's basically linked-up judges who have established a whole new Constitution on top of the national Constitutions. Only now are they getting around to saying, "Oh, yeah, maybe we should have a treaty that we call a constitutional treaty which has a supremacy clause."

For 30 years—more than that now—40 years, you've had European courts saying, "Oh, the European treaties are of higher authority even than our national constitution," and where did that come from? Not from the treaties. From judges saying, "Oh, yeah, it's true," and then reassuring each other and encouraging each other to say that. That would be a big change for us.

Now I want to come back to the security question, because you could say, "Well, all these countries are interlinked and their judges are dialoguing and so it all goes together and isn't that swell and that's really progress. There's no European army." Why is there no European army? Well, because they don't actually trust each other enough to actually have an army together. There isn't even a European police force.

Our Constitution started with this central issue: Are we going to have a national army and are we going to have the means to fund a national army; are we going to have a national executive? That's the difference between the Articles of Confederation and the Constitution, that the Constitution establishes an executive with force, and when we faced that at the beginning, we said, "Okay, yes, we need this, but of course it's dangerous, so we need to have checks and balances and a constitutional structure."

What they have done in Europe, and that is really what's at stake here, is they have said we don't need to do that because that

would frighten people. If you said, yes, a European army, yes, a strong European executive with its own police force, everybody would be rattled. So they say you don't need that; you can just sort of sidle around it and just have the judges networking with each other and then establish European law in that way, and so you don't really need a real constitution with checks or balances.

People who think that way think there is no real conflict in the world. So everybody can agree, and it's convenient to think that there is no real conflict in the world because you never need force and you don't really need to defend yourself, because basically we all agree, and so our judges can dialog and work this thing out.

One of the things that is crucially at stake here is not just some very abstract point about democracy or constitutionalism, but whether the United States can defend itself in its own institutions, and one of the things that is engaged by this trend, I believe, is our capacity to do it. One of the things that is going to start filtering in here—how do people feel about sodomy? I don't know. I don't think it's a burning issue. How do they feel about capital punishment maybe is a more intense issue, but down the road you're going to have questions about what can we do in our anti-terror efforts. I don't think we want to take construction from European judges who have a very different view of this, because their whole view of terror is it's something that happens to other people and keep it away from us.

I think it's quite important to our security and to our sense of ourselves as a nation entitled to defend itself that we keep in focus here that our constitution is about defending ourselves and as an independent nation and the citizens of this nation, as citizens of a nation which is going to protect it, and that is really at stake here in the background too.

Thank you.

[The prepared statement of Professor Rabkin follows:]

PREPARED STATEMENT OF JEREMY RABKIN

Thank you for inviting me to take part in these hearings. I believe the proposed resolution is an appropriate response to a disturbing trend. I very much hope the committee and ultimately the whole House will give it their full consideration.

Let me start by placing these recent Court rulings in larger context. To date, the U.S. Supreme Court has invoked the legal standards of foreign countries in only a handful of cases—that is, cases dealing with the U.S. Constitution. In all of these cases, references to foreign practice or foreign opinion might fairly be described as incidental to the Court's reasoning. So, it may seem that these references are nothing to get excited about.

But if justices who favor citations to foreign claims are content to mention them in footnotes, other justices have taken the trouble to repudiate such references in the text of their opinions (as, for example, both Chief Justice Rehnquist and Justice Scalia did in Atkins). In all likelihood, the critics recognize that what seems a mere stylistic or ornamental element in recent opinions is not something that is occurring in isolation. In fact, the U.S. Supreme Court is flirting with a trend that has already been taken quite a bit further by other courts in other countries. Robert Bork, who surveys the trend in a recent book, calls it "transnational constitutional common law."

The issue, therefore, is not whether any harm has been done by the handful of recent incidental citations by our Court. It is whether the American judiciary should join this larger trend. I think it is proper to express alarm at the first hint that the U.S. courts would join this trend. In what follows, I will lay out three main objections.

First, reliance on foreign legal opinion will encourage judicial activism. One of the main reasons why judges cite precedents is to demonstrate that their decisions are

not simply based on their own personal preferences but follow, in some way, from recognized legal standards. If foreign rulings are relevant guides to the law, then judges have a much larger range of precedents to choose from—or to hide behind.

The point is well illustrated by the two recent cases in which the Supreme Court's majority did invoke foreign standards—*Atkins* v. *Virginia* and *Lawrence* v. *Texas*. In both of these cases, the Court was reversing decisions it had made only some fifteen years earlier.

The Court was therefore at pains to explain why the Constitution had meant one thing in the 1980s and now should mean something else.

Foreign opinion was invoked to give more respectability to the Court's change of heart—or rather, to the shifting balance of votes among the justices (divided now on the issues in these cases, as they were in the 1980s, but with a majority on the other side).

If contrary foreign rulings provide justification for changing American law, then American judges may find many pretexts for abandoning existing precedents and launching in new directions. And the choice will almost always be up to the judges, since foreign courts and foreign standards reflect wide variation. The Court remains free to adopt European views on capital punishment for murderers of subnormal intelligence—as in *Atkins*. Evidently, it does not feel bound, however, to embrace the European view that the death penalty is always improper.

Similarly, there is no indication that the Court is prepared to consider European stances on abortion, which are generally more restrictive than the standards which the U.S. Supreme Court has asserted. The Court seems to regard foreign precedents as something to invoke or ignore, at its own convenience. So instead of limiting the Court, the practice allows the Court to be more free-wheeling. That seems to me bad in itself for an institution whose authority depends on its claim to be discerning law and not merely imposing its own choices.

Of course, there is often dispute about what the Constitution really does mean and how it should be interpreted. It may be that some past rulings of the Court should be reconsidered. But this brings me to my second point. Appeals to foreign practice tend to undermine the notion that we really do (or really should) have a distinct constitution in our own country. Appeals to foreign practice imply that the ultimate issue is simply what the wisest heads regard as the best solution. What we have actually agreed to accept in this country then begins to seem a matter of minor or merely transitory importance.

I am not making a simple-minded appeal to democracy. Courts are not democratic institutions. And it is only in a very figurative sense that our Constitution can be described as "the will of the people," since the people who actually ratified the Constitution, the Bill of Rights and the Fourteenth Amendment have long ago passed on to their rewards. Still, our federal judges are chosen by a political process—in recent years, a very partisan political process—which does answer to our own voters. We implicitly appeal to our citizens to put up with court rulings they find objectionable in the interest of maintaining a common constitutional framework. It is a big leap beyond this understanding to ask Americans to put up with a ruling because it is what foreigners happen to approve.

I think such appeals are bound to undermine respect for law in this country. European courts cite each other. An entire structure of supranational law has been constructed on top of national constitutions in Europe—all by the aggressive application of treaties, which judges in national governments have embraced in part because it gives them more authority in facing their own national parliaments. It may be that Europeans are more comfortable deferring to the guidance of elites, including foreign elites. Apart from Britain, almost all European countries are governed by constitutions which were cobbled together after 1945 or after still more recent periods of dictatorship. Perhaps Europeans prefer foreign supervision to the tyrannies they fell prey to when they were sovereign. But it would be an enormous change for Americans to live by the promptings of foreign authorities. We are less likely to come away with the belief that we have acquired a better, more cosmopolitan constitution, than with the cynical suspicion that we have been left with no constitution at all.

If all this seems rather abstract, let me conclude with a more immediate political point. Resort to foreign precedents may not be disciplined by any sort of clear theory or strict doctrine—as it surely is not now. But it is not likely to be random. Our judges will not invoke precedents from China or Russia or Saudi Arabia. What we are most likely to get is what we have recently gotten—appeals to the sensibilities of western European judges or officials. We share many notions with European legal systems and for just this reason, drawing instruction or inspiration from European courts may seem plausible.

But we also have fundamental differences and some of our most fundamental differences center on the importance of self-defense. American courts have generally been very deferential to the President and Congress when it comes to basic questions about military operations. Our Supreme Court refused in 1980 to question the propriety of an all-male draft. The European Court of Justice directed the Federal Republic of Germany that limits on the participation of women in the German military were contrary to European norms. Our courts have been very reticent about challenging our military's restrictions on the participation of homosexuals. The European Court of Human Rights instructed Britain that it must admit homosexuals to its armed forces. Our courts have been broadly deferential to executive decisions regarding the entry into our country of non-citizens. European courts have insisted that claims about national security cannot excuse interference with the rights of would-be migrants or refugees. Our courts, in general, are far more respectful of legal claims that engage issues of national security. In Europe, judges seem to have far less patience with such claims. The European Court of Human Rights has repeatedly condemned British police practices aimed at suppressing terrorism in Northern Ireland.

We already have major disputes with European states about the best way of coping with the menace of international terrorism. Perhaps we will find more common ground in the coming years. But the very worst way of seeking that common ground, I think, would be for judges—who have no direct responsibility for security and generally very little experience with security issues—to take up European notions from here and from there and grope toward their own vision of common standards.

Should bin Laden or other organizers of the September 11 atrocities be subject to capital punishment? Should they be exposed to fatal attack by American military forces? European opinion holds against such responses. We cannot expect Europeans to participate in military operations of which they disapprove. We cannot expect them to adopt criminal justice measures of which they disapprove. But it may be quite important to the security of the United States in coming years that it retains the moral self-confidence to pursue its own, differing policies and priorities. The Supreme Court in Atkins seemed to acknowledge that European opinion had some claim to be considered in deciding whether American law could impose capital punishment. It is only a short step from Atkins to the notion that European opinion must be considered when our courts decide on the legality or constitutionality of American responses to the challenge of terrorism.

I don't think the American people would accept a scheme in which responsibility for American security were shared with foreign judges or foreign officials—subject only to the shifting sympathies of American judges. I support H. Res. 568 as a means of emphasizing this point to the Supreme Court.

Mr. CHABOT. Thank you, Professor. I might note that this is the first time that, at least in this Committee, the term "surrender monkey" has actually been used. It will be in the record. So at least there's been one first.

Mr. RABKIN. It does capture something.

Mr. CHABOT. Yes, indeed.

Professor Jackson.

STATEMENT OF VICKI JACKSON, PROFESSOR OF LAW, GEORGETOWN LAW CENTER, WASHINGTON, DC

Ms. JACKSON. Thank you, Mr. Chairman.

I want to make three points briefly to explain my opposition to the proposed resolution. First, the reliance on foreign or international law that we have seen in the recent cases is, in my view, consistent with our earliest legal traditions. Our Declaration of Independence was written, its drafters said, out of a decent respect to the opinions of mankind and, like many parts of the Federalist Papers, suggest that the views of the rest of the world should matter.

Early 19th Century Supreme Court decisions made repeated use of the law of nations in deciding questions of U.S. law, including constitutional law. For example, Chief Justice John Marshall in-

voked the law of nations in *Worcestor* v. *Georgia*, which concerned the status of Indian tribes in our Constitutional order. Chief Justice Roger Tawney did so as well in *Holmes* v. *Jennison*. The case involved the question whether the State of Vermont had power to extradite a fugitive to Canada. These and other early comfortable references to the law of nations in resolving important legal questions suggest that contemporary uses of foreign or international law as non-binding but relevant authority are well within our own interpretive traditions.

This brings me to my second point, which is that recent cases, such as *Lawrence*, *Atkins*, or the opinion in *Grutter*, do not involve use of foreign or international law as binding authority, but as relevant or possibly persuasive authority insofar as it reflects information about how other systems have approached similar problems. Relevant non-binding foreign law and institutions has been referred to on many occasions in our court, both to shed light on how our constitution is distinctive from many others and also to show commonalities between our constitution and the legal commitments of other nations that may help us in determining how best to interpret our own laws.

An example of the use of foreign legal matter as negative authority to show how we're distinctive is found in Justice Jackson's great opinion—he's no relation—Justice Jackson's great opinion in the *Youngstown Steel* case where he explored—he had come back from Nuremberg where he was a prosecutor, and he explained in the opinion how the emergency powers provisions of the Weimar Constitution of Germany helped enable Hitler to come to power. This use of foreign authority as a negative example powerfully illuminated how our constitution should be interpreted in light of what it is and we stand for.

In *Miranda* v. *Arizona*, the Court used foreign authority both to distinguish us and to shed light on common legal concerns. The Court described practices followed to protect against abusive custodial interrogations in Scotland, England, and India to explore the likely consequences to law enforcement of our adopting what we now know as the Miranda warnings. These other countries, the Court said, did not have the written protections of our fifth amendment, yet the Court saw their rules as efforts to protect similar interests and as shedding light on how our own written constitutional provision of the fifth amendment should be interpreted.

Although claims that foreign or international law is binding authority in the U.S. may well raise important questions of democratic legitimacy, the thoughtful consideration of foreign precedents or legal institutions in a non-binding way can be a positive good in helping to assure us that our own constitutional decisions are thoughtfully considered and well informed. *Lawrence*'s use of the European decisions was, in my judgment, appropriate not only to correct assertions that had been made in *Bowers* v. *Hardwick*, but also to understand how another respected court in the world had reasoned about a similar problem under similar though not identical legal commitments.

Last, I want to urge great caution in any effort to direct Federal courts in how to engage in their interpretive activity. This is at the core of the judicial process. Part of the U.S. constitutional system

of separation of powers is the institution of judicial review by independent courts of constitutional questions. Disagreement with their decisions is, on occasion, to be expected, though, thankfully under our rule of law system, disobedience is not. But to seek to interject that disagreement into the interpretive process by directing the Court what materials it may and may not look at or refer to risks the appearance of political interference with one of the signal and great contributions of the United States to constitutionalism here and abroad, and that is the independent judiciary as a bulwark for constitutional liberties, freedoms, and rules.

Thank you.

[The prepared statement of Professor Jackson follows:]

PREPARED STATEMENT OF VICKI C. JACKSON

Thank you for the opportunity to provide a statement on proposed House Resolution 568. I want to make three points. First, the "law of nations" and the practices of other constitutional systems have been used since the Founding period to assist the Court in reaching appropriate interpretations of American law. Second, the Court's use of foreign law in *Lawrence* v. *Texas*, 123 S. Ct. 2472 (2003), was not to bind or control its judgments of constitutional questions under U.S. law but to assist the Court in making the best interpretations of our own law. Third, legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions and might be perceived to threaten judicial independence in ways inconsistent with important traditions of American constitutionalism. For these reasons I would urge the House not to adopt the proposed resolution.

Far from being hostile to considering foreign countries' views or laws, the Founding generation of our Nation had what the signers of the Declaration of Independence described as a "decent Respect to the Opinions of Mankind." Congress was empowered in our Constitution to regulate foreign commerce and to prescribe "Offenses against the Law of Nations," the President authorized to receive ambassadors, and the federal courts given jurisdiction over cases arising under treaties as well as under the Constitution and laws of the United States, and over suits affecting ambassadors, or involving aliens or foreign countries as parties in some cases. The Federalist Papers explained that

> An attention to the judgment of other nations is important to every government for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable . . . that it should appear to other nations as the offspring of a wise and honorable policy; the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion or momentary interest, the presumed or known opinion of the impartial world may be the best guide that can be followed.

The Federalist No. 63 (Hamilton or Madison). Although Federalist No. 63 was not directed to the courts, Federalist No. 80 (Hamilton) explained the need for a judicial power broad enough to resolve disputes in which foreign nations had an interest in order to avoid causes for war.

U.S. Supreme Court Justices from the founding period recognized the relevance of the "law of nations" in interpreting U.S. law and resolving disputes before the federal courts. As Justice Story said, in writing the foundational Supreme Court decision in *Martin* v. *Hunter's Lessee*, the judicial power of the United States included categories of jurisdiction, such as admiralty, "in the correct adjudication of which foreign nations are deeply interested . . . [and in] which the principles of the law and comity of nations often form an essential inquiry." *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 335 (1816). The Justices have used understandings of the law and practice of other nations on a number of occasions to assist in reaching correct interpretations of the U.S. Constitution. Thus, for example, in *Worcestor* v. *Georgia*, 31 U.S. 515, 560–61 (1832), the Court, in an opinion by Chief Justice John Marshall, considered the law of nations as helpful in defining the status of Indian tribes under the U.S. Constitution, concluding that they retained rights of self-government with which the states could not interfere. In *Holmes* v. *Jennison*, 39 U.S. 540, 569–73 (1840), Chief Justice Taney's opinion relied on the practices of other

nations to help interpret the Constitution as precluding a state governor from extraditing a fugitive to Canada.[1]

In other cases, as well, the early Court took cognizance of the "law of nations" or other countries' practices in resolving particular controversies: In *The Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 137–46 (1812), the Court relied on "the usages and received obligations of the civilized world" to hold a foreign sovereign's vessel in a U.S. port to be immune from judicial jurisdiction. In *Murray* v. *Schooner Charming Betsy*, 6 U.S. 64, 118 (1804), Chief Justice Marshall wrote that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction" exists. And in determining what the law of nations was, in 1815 the Court commented that "[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect." *Thirty Hogsheads of Sugar* v. *Boyle*, 13 U.S. 191, 198 (1815).

This brings me to my second point. The Court's recent references to foreign law and legal practice seems to me entirely consistent with the founding generation's respectful interest in other countries' opinions and legal rules. *Lawrence* did not treat foreign court decisions as binding authority, which is an important distinction. Rather, the foreign decisions were cited in *Lawrence* for two purposes: The first was to correct or clarify the historical record referred to in Chief Justice Burger's opinion in *Bowers* v. *Hardwick*, 478 U.S. 186 (1986), a decision reversed by *Lawrence*. As the *Lawrence* Court wrote, "The sweeping references by Chief Justice Burger to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction," including the *Dudgeon* case decided by the European Court of Human Rights in 1981. Second, the *Lawrence* opinion suggested, the European decisions invalidating laws prohibiting adult, consensual homosexual conduct raised the question whether there were different governmental interests in the United States that would support such a prohibition on human freedom, and concluded there were not. See 123 S. Ct. at 2483. This use of foreign law to interrogate and question our own understandings is something that will help improve the process of judicial reasoning, but certainly does not necessarily lead to the conclusion that our law should follow that foreign law.

Indeed, on a number of occasions our Court has referred to foreign practice to *distinguish* our own Constitution from that of other nations. In the great Youngstown Steel Case, the Court held that President Truman lacked constitutional power to order seizure of the steel companies. Justices Frankfurter and Jackson alluded to the dangers of dictatorship that other countries had recently experienced, Justice Jackson explaining in some detail features of the Weimar Constitution in Germany that allowed Hitler to assume dictatorial powers. See *Youngstown Sheet & Tube Co* v. *Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J.) ("absurd to see a dictator" in President Truman but "accretion of dangerous power does not come in a day"); *id.* at 651–52 (Jackson, J.) (discussing German, French and British approaches to emergency powers). And in *Miranda* v. *Arizona*, 384 U.S. 436, 489–90 (1966) the Court suggested that our Fifth Amendment should be interpreted to provide at least as much protection to rights against improper custodial interrogations as did certain other countries.[2]

Considering other courts' decisions on shared concepts—of liberty, equality, freedom of expression, cruel and unusual punishment—can help clarify what the U.S. Constitution stands for—to what extent its precepts are shared, and to what extent they are distinctive. The U.S. constitution has, directly or indirectly, inspired many other nations to include commitments to liberty, freedom and equality in their own constitutions. It is thus understandable that such nations may look to our courts'

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[1] Although there was no opinion of the divided Court and the writ of error was dismissed for want of jurisdiction, Justices Story, McLean and Wayne concurred "entirely" with the Chief Justice's opinion. 39 U.S. at 561. The Reporter's Note at the end of the case indicates that after the case was disposed of in the Supreme Court, the Vermont state court concluded that, "by a majority of the Court it was held that the power claimed to deliver up George Holmes did not exist" and discharged him. 39 U.S. at 598.

[2] After describing the protections of, inter alia, England, Scotland and India, against improper custodial confessions, 384 U.S. at 486–89, the Court indicated that our own situation was similar enough that their positive experience gave "assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them." *Id.* at 489. It went on to say: "It is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined." *Id.* at 489–90.

decisions and over time expect our courts to be aware of their courts' interpretations of legal concepts having a common source of inspiration. For the many nations around the world whose own constitutions have been inspired in part by that of the United States, and whose judges believe that we share commitments to ideas of liberty, freedom and equality, the U.S. Court's occasional consideration of foreign court decisions is, in a sense, a recognition of common judicial commitments—often inspired by the example of the United States—to the protection of individual rights. And on the current Court, Chief Justice Rehnquist,[3] as well as Justices Breyer,[4] Ginsburg,[5] Kennedy,[6] Scalia[7] and Stevens,[8] have referred to or noted foreign or international legal sources in their opinions in U.S. constitutional cases. It is thus not only a traditional legal practice but one that has been used by justices who otherwise have very different views.

Finally, the questions of what sources are to be considered in giving meaning to the Constitution in adjudication is one that is, in my view, committed by the Constitution to the judicial department. *Marbury* v. *Madison* famously explained: "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803). A core aspect of determining what the law of the Constitution is requires consultation of relevant and illuminating materials—from the enactment and ratification history, from interpretations by state and federal courts of the provision or of analogous state constitutional provisions, from the course of decisions by legislatures and executive officials about what action is required or permitted, and from the considered judgments of other courts and commentators on the same or analogous questions. All of these kinds of sources have been and may be considered when the justices conclude that they shed legal light on the problem before them.

Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system. It could be seen both here and elsewhere as an attack on the independence of the courts in performing their core adjudicatory activities. Around the world, the most widely emulated institution established by the U.S. Constitution has been the provision for independent courts to engage in judicial review of the constitutionality of the acts of other branches and levels of government. Congress should be loath even to attempt to intrude on this judicial function, with respect to a practice that dates back to the founding, and at a time when the United States is deeply engaged in promoting democratic constitutionalism in countries around the world, including provision for independent courts to provide enforcement of constitutional guarantees.

Mr. CHABOT. Thank you, Professor.

Professor Ramsey.

STATEMENT OF MICHAEL D. RAMSEY, PROFESSOR OF LAW, UNIVERSITY OF SAN DIEGO LAW SCHOOL, SAN DIEGO, CA

Mr. RAMSEY. Mr. Chairman and Members of the Committee, thank you for the opportunity to express my views on the matter. In my written statement, I've explained in detail why I think H. Res. 568 is an appropriate response to some Supreme Court decisions and academic commentary, and I will make a brief summary here.

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[3] See *Planned Parenthood* v. *Casey*, 505 US 833, 945 n. 1 (1992) (Rehnquist, C.J. dissenting) (describing German and Canadian constitutional cases on abortion). But cf. *Atkins* v. *Virginia*, 536 U.S. 304, 324–35 (2002) (Rehnquist, C.J., dissenting).

[4] See, e.g., *Foster* v. *Florida*, 537 U.S. 990, 991–93 (2002) (Breyer, J., dissenting from denial of certiorari).

[5] See *Grutter* v. *Bollinger*, 123 S. Ct. 2325, 2347 (2003) (Ginsburg, J., concurring) (referring to international covenants that provide for temporary measures of affirmative action).

[6] See *Lawrence*, 123 S. Ct. at 2481, 2483 (discussing European Court of Human Rights cases invalidating laws prohibiting adult homosexual conduct).

[7] See *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 381–82 (1995) (Scalia, J., dissenting) (referring to Australia, Britain and Canadian prohibitions on anonymous campaigning as bearing on whether such a prohibition protects or enhances democratic elections). But cf. *Printz* v. *United States*, 521 U.S. 898, 921 n. 11 (1997) (Scalia, J.)

[8] See *Atkins* v. *Virginia*, 536 U.S. 304, 316 n. 21 (2002) (referring to views of the "world community" on imposition of the death penalty on the mentally retarded as reflected in an amicus brief of the European Union).

No one seriously disputes that reference to foreign materials is entirely appropriate under certain circumstances. When foreign courts have previously interpreted the same legal texts that a U.S. court is considering, of course it is informative, though not dispositive to see what other courts have said on the matter. For example, Justice Scalia recently argued that the Supreme Court in interpreting a provision of the Warsaw Convention on air carrier liability should consider what foreign courts have said about that same provision of the Warsaw Convention. Further, foreign materials are, of course, important in understanding the content of customary international law when U.S. courts are called upon to apply it and may provide background to understand the context in which U.S. laws were enacted.

The new use of foreign materials being proposed, and to some extent adopted by the Supreme Court in a few recent decisions, however, is entirely different. For example, in *Lawrence* v. *Texas*, the recent case striking down Texas' anti-sodomy law, the Court relied in part on *Dudgeon* v. *United Kingdom* and related cases of the European Court of Human Rights, but these two courts were interpreting entirely distinct legal texts. The Supreme Court was interpreting the due process clause of the 14th amendment adopted in 1868 in the United States. The European court was interpreting the European Convention for the protection of human rights and fundamental freedoms, a treaty among European countries adopted in 1953.

More over, as the Court in *Dudgeon* made clear, the language in the two documents and the interpretation the courts have placed upon that language is totally different. Under the due process clause, according to the Court's prior precedent, the question was whether anti-sodomy laws had a rational basis, essentially whether they're a reasonable exercise of the state's police power. Under the European Convention, the question is whether anti-sodomy laws were "necessary to protect public health and morals," which the European court explicitly said meant "a pressing social need" and not merely "reasonable."

In sum, what the European court said about the text of the European Convention was not informative about the meaning of the text of the 14th amendment because those are two totally different legal texts.

As *Dungeon* and *Lawrence* illustrate, and contrary to the statements of at least one Supreme Court justice, Justice Breyer, there is no "global legal enterprise in constitutional law." That's because there is no single global constitution which the world's courts are collectively engaged in interpreting as they are, in contrast, to the case of the Warsaw Convention. There are only a series of distinct legal texts with different language adopted in different places, times, and contexts. Sometimes these may have some relationship to one another, but often they do not.

When U.S. courts look to foreign materials in the way the Supreme Court did in *Lawrence*, they are not using foreign materials to aid in the interpretation of a specific legal text, but instead are looking to foreign statements of moral and social policy to inform their own thinking about moral and social policy. Further, no one is seriously proposing that U.S. courts should in all cases or even

in difficult cases adopt the moral and social policy of foreign jurisdictions, nor that U.S. courts should consider the moral and social policy of all foreign jurisdictions.

Such an approach would require enormous cutbacks in the constitutional rights of Americans, because the U.S. recognizes many rights that are rarely recognized abroad. For example, most European countries in the European court allow much greater restrictions on free speech. They allow much greater government support for religion than permitted by our establishment clause. They allow more interference with religious practice than does our free exercise clause. They have fewer rights to bear arms and to own property. They lack many of our criminal procedure protections, such as the exclusionary rule. They lack many of our protections for abortion rights.

Advocates of the *Lawrence* approach do not want foreign practices to force them to give up the rights that they favor. As a result, the *Lawrence* approach is inherently selective. Indeed, in *Lawrence* itself, the Court looked at some jurisdictions which had repealed or overturned anti-sodomy laws while ignoring many jurisdictions that retain anti-sodomy laws. Just a few years earlier, in *Stenberg* v. *Carhart*, the Court overturned a Federal ban on late-term abortions under the same provision of the U.S. Constitution that was at issue in *Lawrence* without considering the likelihood that many foreign jurisdictions, including in Europe, also ban late-term abortions.

It seems clear that the justices and the academic commentators who support them want to use foreign materials not on the basis of any principle appropriate, but merely when they happen to coincide with the justice's own moral and social preferences.

Finally, I agree that it is appropriate that we in the United States consider the differing approaches of foreign jurisdictions in formulating moral and social policy, just as States within the United States look to experiences and practices of other States in formulating their laws; however, this is a job for Congress and the State legislatures, not for the courts. The role of the courts is to determine the meaning of legal texts enacted by the people and their representatives. That is done by looking at the intended meaning of the text and perhaps by the evolving moral and social values of American society.

The decision whether to change American values, whether by reference to foreign values or the internal values of a lawmaker, is one for legislatures and for the people and not for the courts. It is inconsistent with the rule of law for U.S. courts to pick and choose among the moral and social policies of selectively determined foreign jurisdictions to justify imposing moral and social values upon the American people that are not reflected in U.S. law.

Thank you.

[The prepared statement of Professor Ramsey follows:]

PREPARED STATEMENT OF MICHAEL D. RAMSEY

I thank the Committee for the opportunity to express my views on the proper use of foreign materials by U.S. courts.[1] My opinion is, in sum, as follows. Foreign materials are relevant to the interpretation of U.S. law in numerous circumstances, most notably where foreign courts have interpreted the same or parallel legal texts as those under consideration by the U.S. court. However, some recent Supreme Court decisions—and, even more so, some recent claims by attorneys, law professors and individual Justices—have gone too far in giving weight to foreign materials as, in effect, persuasive statements of social policy. This is problematic in several respects. Consideration of the views and experiences of foreign jurisdictions is surely appropriate in the formulation of moral and social policy, but it is properly a function of Congress and state legislatures, not the courts. If U.S. courts adopt a principled rule that they will be guided by the moral and social policy of foreign jurisdictions across the board, the result is likely to be a substantial reduction of rights in the United States, since in many respects the United States protects rights than are rarely recognized elsewhere. If U.S. courts instead cite foreign materials selectively, to implement only moral and social policy choices with which they agree, it will become obvious that these citations are not being used to elucidate interpretations of legal texts, but rather as cover for the Justices to implement their own policy preferences. This is not consistent with the rule of law or the proper role of the judiciary.

GENERAL PRINCIPLES

I begin with a few examples of the appropriate use of foreign sources. First, U.S. courts may be called upon to interpret *the same* language that foreign courts have previously interpreted. While a foreign court's view of that language is obviously not binding, it may be persuasive, or at least informative, on the question of what the language means. This is most common in the case of treaties. For example, in a recent case the Supreme Court was called upon the interpret the meaning of the word "accident" in the Warsaw Convention on air carrier liability.[2] As Justice Scalia argued (in dissent), it would be appropriate to consider what foreign courts had decided when faced with the question of the meaning of the word "accident" in the Warsaw Convention.[3]

Second, a U.S. statute or constitutional provision may be derived from a prior law or constitutional provision of a foreign nation, or adopted in an international context that is relevant to its meaning. In that instance, it is important to understand the meaning of the provision upon which the U.S. language is based or the context in which it was adopted—and that may be done by considering foreign materials. For example, many provisions of the U.S. Bill of Rights are based upon parallel provisions in the English Bill of Rights of 1688 or other provisions of pre-existing English law,[4] so citations to English decisions interpreting those provisions are surely appropriate.[5]

Third, U.S. statutes are sometimes intended as implementations of international law (as is the case, for example, of many provisions of the Foreign Sovereign Immunities Act), and the U.S. Constitution has several provisions that refer to international law itself or to international law concepts such as treaties and warmaking. In such cases, a U.S. court should investigate the international law that the U.S. law was intended to implement, an inquiry that could be assisted by looking at what foreign institutions had said about the relevant provisions of international law.[6] Similarly, U.S. courts are sometimes called upon to implement international law directly (as in the interpretive canon that ambiguous statutes are construed not to

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[1] Parts of this statement are based on a forthcoming article in the American Journal of International Law. Michael D. Ramsey, International Materials and Domestic Rights: Reflections on Atkins and Lawrence, ___Amer. J. Int'l L. ___ (forthcoming 2004).

[2] *Olympic Airways* v. *Husain,* No. 02–1348, Feb. 24, 2004.

[3] "We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently. . . . Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration." *Id.,* slip op. at 4 (Scalia, J., dissenting).

[4] Foreign courts sometimes cite U.S. decisions for this reason: some foreign constitutions used the U.S. Constitution as a model.

[5] See *Harmelin* v. *Michigan*, 495 U.S. 956 (1990) (using English decisions and practice to understand context of the Eighth Amendment).

[6] For example, I have argued that in determining the meaning of the Constitution's declare war clause, it is important to understand the international law meaning of "declaring" war in the eighteenth century. Michael D. Ramsey, Textualism and War Powers, 69 U. Chicago L. Rev. 1543 (2002).

violate international law). Again, in determining the content of international law, U.S. courts might appropriately look to decisions of foreign institutions.

These examples are an illustrative not exhaustive list. There are likely many other situations in which reference to foreign materials by U.S. courts would be natural and non-controversial. They share a common attribute: each involves a situation in which the U.S. court is asking *the same question* about *the same legal text or concept* as foreign courts or other institutions have previously asked.

A second category of references to foreign materials is more controversial, but, in my view, usually appropriate if done cautiously. These references arise when the constitutionality of a U.S. law can be informed by *facts* existing in a foreign country. For example, the Supreme Court has interpreted the First Amendment's protection of free speech to require, in general, that content-based restrictions of speech must be necessary to serve a compelling government interest (or some similar language).[7] The government might thus assert that a challenged regulation is "necessary" to prevent some great harm; but if other countries do not have the regulation and yet suffer no great harm, that might be evidence that the regulation is not necessary (and hence is unconstitutional). Similarly, under the Due Process Clause, the Supreme Court has said that laws not implicating fundamental rights need only have a "rational basis" to be constitutional. Events and experiences in foreign countries might suggest that concerns advanced by the government in support of a law are in fact rational, because they have actually arisen in foreign countries. Thus, in *Washington* v. *Glucksberg* the U.S. Supreme Court looked at practice in the Netherlands, which has experience with legalized euthanasia, in deciding that the state's concerns about permitting euthanasia were at least rational.[8]

This sort of reliance on foreign experiences has dangers, because it may be difficult to translate foreign experiences into U.S. contexts. A rule, or absence of a rule, that has one effect in a foreign country may, because of differing cultures, have a very different effect in the United States. Nonetheless, treated with appropriate caution, foreign experiences may be relevant as factual data points, where courts are called upon to evaluate the likely practical effects of a law or action. As Professor Gerald Neuman has said, they are preferable to mere "armchair speculation" about possible effects.[9]

A third, and somewhat more problematic category, arises if a U.S. court decides that the existence or non-existence of a right or duty in U.S. law depends upon how widely that right or duty exists in foreign nations. U.S. law might explicitly make its scope dependant upon the existence of a parallel rights or duties in foreign countries (as, for example, in reciprocal trade statutes or reciprocal inheritance laws). It is also possible that the drafters of a U.S. provision might implicitly intend that the scope of that provision should depend upon whether similar rules exist elsewhere. For example, Justice Scalia and others have argued, in the context of constitutional provisions turning upon the existence of "fundamental rights," that a right fully embedded in the history and traditions of the United States might still not be "fundamental" in the constitutional sense if it is not widely recognized abroad.[10] I am not sure this is often an appropriate methodology, because it usually does not rest on any close connection to the intended meaning of the statute or constitutional provision at issue, and I am skeptical that there are many provisions in U.S. law whose drafters intended that they depend on the scope of rights elsewhere. To be sure, *if* a U.S. law or constitutional provision directs (explicitly or implicitly) that its scope depends upon the existence or non-existence of parallel rights elsewhere, then it is appropriate to use foreign materials to assist in the implementation of the U.S. provision, but such intent would need to be determined on a provision-by-provision basis.

Although the second and third categories I have described above seem somewhat more problematic than the first, each of them shares the common attribute that foreign materials are used to effectuate the original meaning of the U.S. provision in question. A distinct category—and to my mind an illegitimate one—is when the U.S. law in question does *not* direct the U.S. court to consider foreign judgments, but the court does so anyway, in the service of an "evolving" or "living" interpretation of the law.

I do not propose here to enter into the debate over whether interpretation should always be limited to an inquiry into the original meaning of a text, or whether

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[7] *New York Times* v. *United States,* 403 U.S. 713 (1971).

[8] *Washington* v. *Glucksberg,* 521 U.S. 702, 721–724 (1997).

[9] Gerald Neuman, The Uses of International Law in Constitutional Adjudication, ___Am. J. Int'l. L.___ (forthcoming 2004).

[10] *Thompson* v. *Oklahoma,* 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting);*Palko* v. *Connecticut*, 302 U.S. 319 (1937); *Hurtado* v. *California*, 110 U.S. 516 (1884).

meanings may sometimes "evolve" with our changing society. Even if the latter is true in some instances, it seems problematic to make that evolution turn upon the morals and values of *other* societies. Presumably, we decide to adopt a view of a U.S. law different from its original meaning because we feel that changes in *our own* society make the original rule no longer appropriate. It would seem odd, therefore, to say that, although American society has not changed in a way that would require an evolving interpretation of a U.S. law, that foreign societies have done so.[11] To return to the First Amendment context, we may feel confident that strong protections of anti-government speech are contained in the intent of the Amendment itself, and that U.S. society has not evolved in a way to bring them into question; yet we might also note that many countries around the world have more restrictive limits on anti-government speech.[12] It is hard to see how the latter evidence would justify a departure from an interpretation of the First Amendment that is consistent with both its original meaning and with modern American values. Nonetheless, this is what some recent Supreme Court cases, and some academic commentary, seem to be suggesting.

SPECIFIC EXAMPLES OF SUPREME COURT PRACTICE

I now turn to specific evaluations of two recent Supreme Court cases that have excited much attention for their use of foreign materials: *Atkins* v. *Virginia*, concerning the constitutionality of executing mentally handicapped defendants, and *Lawrence* v. *Texas*, concerning the constitutionality of criminalizing homosexual sodomy.[13] In each case the Court found the challenged law unconstitutional, and relied in part upon evidence of foreign practices. In each case several Justices registered strong objections to the use of such materials. And in each case some of the briefs made extensive use of foreign materials, urging an even greater reliance upon them.[14]

In *Atkins*, the Court relied in part upon the opinion of the "world community" that mentally handicapped defendants should be exempt from the death penalty, in deciding that executing the mentally handicapped violated the Eighth Amendment's ban on "cruel and unusual punishment."[15] As I have described elsewhere, there are serious methodological problems with how the Court determined the "opinion of the world community"—including the fact that the court did *not* cite any foreign judgments, but only the amicus briefs of one of the parties, which were in turn either misleading or inaccurate in important respects.[16] But leaving this aside, the relevant question here is, assuming that in general most nations do not execute the mentally handicapped, whether that should be relevant to the meaning of the Eighth Amendment.

The Court made no attempt to show *why* foreign practice should be relevant (the citation was in an footnote, made almost as an aside). There is no legal text parallel to the Eighth Amendment that has been interpreted in a foreign country in any way that is helpful to discerning the original meaning of the Eighth Amendment. Even if most foreign countries disapprove such executions, they do not do so as a result of an interpretation of the language of the Eighth Amendment, or anything upon which the Eighth Amendment was based. The Court's interpretation of the Eighth Amendment in *Atkins* did not turn on facts or predictions about effects that could be influenced by practice in foreign countries.[17] And third, the Court did not show

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[11] For the foreign materials to have any relevance to the decision beyond mere window-dressing, we must posit a situation in which the court's evaluation of the values of American society (however those may be determined) lead to a different result from its evaluation of foreign materials. Otherwise, the foreign materials are not truly a factor in the decision.

[12] For key European decisions on free speech that may be less protective than U.S. law, see, e.g., *Zana* v. *Turkey*, 27 E.H.R.R. 667 (1997); *Observer and Guardian* v. *United Kingdom*, 14 E.H.R.R. 153 (1991); Barfod v. *Denmark, 13 E.H.R.R. 493 (1998).*

[13] *Atkins* v. *Virginia,* 536 U.S. 304 (2002); *Lawrence* v. *Texas*, No. 02–102 (June 26, 2003).

[14] To be clear, in the subsequent discussion I am not taking any position on the correct outcome of either case—only upon the type of evidence that should and should not have influenced the outcome.

[15] Atkins, 536 U.S. at 316 n. 21 ("Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.").

[16] Michael D. Ramsey, International Materials and Domestic Rights: Reflections on Atkins and Lawrence, ____Amer. J. Int'l L.____ (forthcoming 2004).

[17] Justice Scalia in dissent suggested that a categorical rule against executing the mentally handicapped was a bad one because of the dangers of undetectable faking. Assuming that this should be relevant to the outcome, this is something that could be tested empirically by examining the experiences of jurisdictions that have a categorical rule.

that the Eighth Amendment itself, in its original understanding, depended upon the scope of punishments in foreign countries.

On the third point, it is of course possible that the drafters of the Eighth Amendment intended that its scope be affected by the severity of punishments in foreign countries, but I think that unlikely. For example, suppose a certain punishment was thought repugnant by Americans at the time the Amendment was adopted, and continues to be thought repugnant by most Americans today, but the punishment has been widely adopted throughout the world. Would that justify allowing the punishment in the few American jurisdictions that sought to adopt it? I think not, because the founding generation in America in many cases (including, I would say, in the Eighth Amendment) defined their values *in opposition* to what was practiced in much of the world. Most jurisdictions in the Framers' day did *not* protect their citizens from brutal punishments; the point of the Eighth Amendment was to establish a uniquely American standard. But if the practices of the world do not permit us to diminish the protections of the Eighth Amendment, they also should not permit us to enlarge its protections. In any event, there is no evidence that the Framers expected or condoned such an approach.

Instead, what the Court seemed to be saying in *Atkins* is that other jurisdictions' decisions not to execute the mentally handicapped (whether for moral, constitutional, practical or other reasons) should influence our decision whether to permit such executions in the United States. As a matter of social policy, I agree with that proposition: we should surely consider (though not feel bound by) other nations' approaches to similar social problems (just as, in our federal system, individual states should consider, though not feel bound by, approaches to similar social problems by other states). Thus the Congress, and individual state legislatures should consider foreign practices in deciding whether there should be a categorical rule against executing the mentally handicapped.

However, it is not the role of the Supreme Court to set U.S. social policy, with respect to executions or otherwise: the Court's role, in the *Atkins* case, was to interpret the Eighth Amendment. That means that the Court should base its decision upon the original meaning of the Eighth Amendment, or (perhaps) upon an evolving meaning that resonates with modern American values. In any event, its decision should turn upon the interpretation of the legal text. Congress, and the state legislatures, are the appropriate bodies to determine social policy (and thus to consider the relevance of social policies of foreign jurisdictions).

The Court's decision in *Lawrence* shows some similar problems. The issue there was whether a state law criminalizing homosexual sodomy violated the Due Process Clause of the Fourteenth Amendment. According to prior precedent, the question should have been decided by asking (a) whether homosexual sodomy was a fundamental right, and (b) if not, whether the state had a rational basis in banning it.[18] Since the Court did not appear to find a fundamental right, the rationality of the state law was the central constitutional question. That issue had already been decided by the Court in its prior decision in *Bowers* v. *Hardwick*,[19] but the Court in *Lawrence* decided that *Bowers* should be overruled on this point.

In addressing this question, the Court discussed several decisions of the European Court of Human Rights (ECHR), and referred to an amicus brief that described the law in some foreign countries.[20] There are two ways to view this approach, one of which is much more limited and defensible than the other. First, the state in *Lawrence* (and to some extent the Court's prior discussion in *Bowers*) relied in part upon a claim that bans on homosexual sodomy were pervasive in Western civilization. To the extent that such a claim is relevant, it seems appropriate to look at foreign jurisdictions to show that this claim is not true. That is, the actual practice of foreign nations can be used to refute arguments based upon unfounded claims about supposed foreign practice. Though this defensive use of foreign materials by the Court does not seem too objectionable, I would prefer if the Court had simply rejected the state's claims as irrelevant. The fact (if it is a fact) that many nations currently ban homosexual sodomy does not show that such bans are rational, or otherwise inform the original meaning or modern meaning of the U.S. Due Process Clause.

Another way of looking at *Lawrence*, however, is that the Court used foreign practice as an affirmative argument in favor of striking down the statute. That is, it

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[18] *Washington* v. *Glucksberg,* 521 U.S. 702, 721 (1997).

[19] 478 U.S. 186 (1986).

[20] "[I]t should be noted that the reasoning and holding of Bowers have been rejected elsewhere [citing three decisions of the ECHR]. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. [citing an amicus brief]. The right petitioners seek in this case has been accepted as an integral part of human freedom in many other countries." Lawrence, slip op. at 16.

thought that because other jurisdictions had de-criminalized homosexual sodomy, the U.S. should do so as well. This resembles the Court's claim in *Atkins*, and is similarly problematic because it is a statement of social policy rather than an interpretation of a legal text.

The Court's citation of the ECHR (and especially its claim that the ECHR had "rejected" the "reasoning and holding in *Bowers*") suggests that constitutional courts are all engaged in a common interpretive enterprise (as in fact they are when they are interpreting a common legal text such as the Warsaw Convention). But as a matter of legal interpretation, there is no direct connection between the U.S. Constitution and foreign court opinions that address the interpretation of different documents written in different times and different countries. The mandate of the ECHR, for example, is to interpret the European Convention for the Protection of Human Rights and Fundamental Freedoms, a treaty among European nations drafted in the 1950s. Under the Convention, the question is whether sodomy laws violate the right (in Article 8(1)) to "privacy and family life" and are not justified under Article 8(2) (restrictions that are "necessary" to protect listed social values). Under the U.S. Constitution, as discussed, the question is whether the right is "fundamental" and, if not, whether the law is rationally related to a legitimate governments interest. Thus in confronting sodomy laws the ECHR and the U.S. Supreme Court faced entirely distinct texts, with a distinct body of precedent elaborating upon the meaning of key phrases. It is too simplistic to say that both are doing constitutional law, and so doing the same thing. Rather, they are both interpreting texts, but the texts they are interpreting are distinct.

Dudgeon v. United Kingdom, the leading European case cited in *Lawrence*, confirms this point. According to *Dudgeon*, the principal question it faced was whether the sodomy law was "necessary . . . for the protection of health or morals" (the quoted language being the text of Article 8(2) of the Convention). The ECHR emphasized that in this context "necessary" meant a "pressing social need" or a "particularly serious reason" and not merely "reasonable."[21] In the U.S. case, in contrast, assuming that the *Lawrence* Court was following its own precedents in other respects, the Court was asking not whether sodomy laws were "necessary" but whether they were reasonable—that is, exactly the question *Dudgeon* said it was *not* asking.

The question, then, is how the conclusions of a European Court, interpreting a legal document totally distinct in language and context from the U.S. Constitution, could have implications for the correct interpretation of the U.S. Constitution. In a strictly legal sense, the answer should be that they do not, because the two courts are engaged in a distinct legal enterprise. Contrary to the observations of one U.S. Supreme Court Justice, there is no such thing as a "global legal enterprise in constitutional law,"[22] because there is no single global constitution. There is broad commonality among constitutional courts only if one thinks that the courts are not really interpreting texts, but deciding whether sodomy laws are justifiable as a matter of moral and social policy.

As in *Atkins*, under our constitutional system legislatures not courts should make decisions regarding matters of moral and social policy. It is appropriate for *legislatures* to consider the moral and social policy decisions of foreign jurisdictions with respect to anti-sodomy laws to guide their own moral and social decisionmaking on that issue. Courts, on the other hand, make (or should make) decisions concerning interpretation of specific legal texts. It is appropriate for courts to consider the interpretive decisions of foreign jurisdictions to guide their own interpretive decisions *on the same legal texts*. As the foregoing discussion illustrates, in relying on the *Dudgeon* case in *Lawrence*, the Supreme Court was not looking to the European court for interpretative guidance as to the meaning of a legal text, but was looking to the European court for guidance as to moral and social policy.

In sum, in both *Lawrence* and *Atkins* the Supreme Court did not appear to be looking to foreign materials to aid in legal interpretation of the text of the U.S. Constitution, but rather it looked to foreign materials to provide what Professor Gerald Neuman has called "normative insight." But it is contrary to the constitutional role of courts for courts (rather than legislatures) to be making moral and social policy in this way. Courts should decide what a text means, not what the best moral and social outcome should be. The meaning of a text that forms part of U.S. law is not affected by what other jurisdictions have decided about matters of moral and social policy, or by what other courts have decided about the meaning of different legal texts.

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[21] *Dudgeon* v. *United Kingdom,* 45 E.C.H.R., para. 49–52 (1981).

[22] Justice Breyer, quoted in Roger Alford, Misusing International Sources to Interpret the Constitution, ____Am. J. Int'l L.____ (forthcoming 2004).

PRINCIPLED ADJUDICATION AND THE DANGER OF USING FOREIGN MATERIALS

While realists may say that courts routinely make decisions of moral and social policy, there are particular dangers of U.S. courts relying (or purporting to rely) upon foreign materials in this process. As part of our constitutional system, we expect courts to make decisions on the basis of neutral, generally applicable legal principles.[23] If U.S. courts adopt a practice of relying on foreign materials, we would expect that foreign materials be treated as authoritative guides *as a general matter*, not merely in cases in which the foreign materials happen to support moral and policy intuitions arising from other sources. But this principle leads to one of two outcomes, each unsatisfactory.

First, courts might *in fact* treat foreign materials as authoritative across the board. The result, though, would likely be a lessening of U.S. rights. The recent push for foreign materials has come most strongly from rights advocates, and in *Lawrence* and *Atkins* the United States lagged at least parts of the world, and parts of world opinion, in guaranteeing the rights at issue. But there is nothing necessarily rights-enhancing about foreign materials. In many areas, it seems likely that the United States is an outlier in *protecting* rights that few other societies recognize—such as the First Amendment. As I have suggested, freedom of speech is one important example. Another is freedom of religion: many countries have much greater establishment of religion (as in Europe, where many countries have an established church or explicitly "Christian" parties); at the same time, many countries have lesser protections for the free exercise of religion (as the controversy in France over headscarves and other religious headgear suggests).[24]

Beyond the First Amendment, it seems clear that many foreign nations lack the rights, for example, to bear arms and own property guaranteed in the U.S. Constitution—indeed, as with many of our constitutional provisions, the framers' intent was to guarantee rights that were *not* traditionally recognized elsewhere. In addition, the United States has elaborate procedural protections for criminal defendants, as a matter of the Court's interpretation of open-ended constitutional clauses such as "unreasonable" search and "due" process, that likely go far beyond those existing in most foreign nations. For example, it appears that the "exclusionary rule" of the Fourth Amendment, which excludes from trial evidence obtained in unconstitutional searches, has few counterparts worldwide.[25] Should each of these rights be re-evaluated to see if they are generally recognized by foreign nations, and abandoned if they are not? If we are serious about the project of using foreign materials, we must "take the bitter with the sweet" and use foreign materials to contradict, not merely to confirm, our own view of rights.

I doubt, though, that there is the moral and political will to apply foreign materials in this way. More likely, then, is the selective use of foreign materials to support judgments reached for other reasons. One can already see this developing in Supreme Court advocacy and jurisprudence. First, there is selective citation to countries whose practices happen to support a particular result, but not to those that contradict it. In *Lawrence*, for example, the Court discussed some jurisdictions that had overturned or repealed their sodomy laws, but did not discuss anything close to a general practice of nations. Though I have not made systematic inquiries, it seems likely that quite a number of foreign jurisdictions criminalize sodomy. This went unmentioned in *Lawrence*. In *Atkins*, the Court claimed, without adequate support, that "world opinion" opposed execution of the mentally handicapped. In fact, it appears that many leading death penalty jurisdictions do not make such a categorical exception, and that opposition comes mostly from countries and scholars that oppose the death penalty across the board.

Of course, one might say that some countries are better moral models than others. Should it matter, for example, that Chinese law apparently permits the execution of the mentally handicapped? But attempting to articulate a legal principle justifying this sort of selectivity, if done explicitly, leads courts into another unsatisfactory choice. Presumably we do not want attorneys arguing, and the Supreme Court

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[23] See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959). As the Court's plurality put it in Planned Parenthood of Pennsylvania v. *Casey, the Court's legitimacy arises from it "making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." 505 U.S. 833, 866 (1992).*

[24] See Christopher Marquis, U.S. Chides France on Effort to Bar Religious Garb in Schools, N.Y. Times, Dec. 19, 2003, at A8.

[25] See Erik J. Luna & Douglas Sylvester, Beyond Breard, 17 Berkeley J. Int'l. L. 147, 177–79 (1999) ("Legal rules suppressing relevant probative evidence from criminal trials are few and far between outside the United States.").

deciding, which of (say) Japan, Thailand, Pakistan, China, *etc.*, are sufficiently "civilized" to serve as moral precedents.

A further selection problem is that the Supreme Court has invoked foreign materials only in some cases, and not others. As Professor Roger Alford has pointed out, the Court's recent decision invalidating the previous federal law against late-term abortions under the due process clause, *Stenberg* v. *Carhart*, made no reference to foreign materials.[26] Yet it seems likely that foreign jurisdictions have grappled with this issue. Moreover, it seems at least possible that the weight of foreign practice (which generally does not embrace abortion rights as fully as U.S. jurisprudence) does not permit late-term abortions. It is hard to square *Stenberg*'s disregard for foreign practice with *Lawrence*, which involved the same clause of the U.S. Constitution, other than on the ground that in *Lawrence* the Court approved of the foreign practice and in *Stenberg* it did not.

This selectivity confirms that courts are not really being guided by foreign materials in their readings of specific texts, but are using foreign materials to support decisions of moral and social policy reached on other grounds.[27] And this further confirms that considering foreign practice as a guide to moral and social policy decisionmaking is properly a legislative, not a judicial, function. Legislatures acknowledge that their decisions are policymaking that is not based on interpretive principles. Thus they are free to consider the views and practices of foreign jurisdictions, adopting what they like and discarding what they do not like, for policy reasons without the need to justify their decisions in judicial terms. When courts behave in this way (as it seems inevitable that they will in dealing with foreign materials), the rule of law and the role of courts is undermined.

CONCLUSION

In *Lawrence* and *Atkins*, the use of foreign materials, while open to serious question, probably did not affect the ultimate outcome of either case. To see the potential scope of the use of foreign materials, it may be useful to consider recent comments by Professor Harold Koh of Yale Law School. In an article published in the *U.C. Davis Law Review*, Professor Koh urged that human rights advocates use foreign materials to persuade the Supreme Court to abolish the death penalty.[28]

It seems plain that the Framers did not intend to exclude the death penalty through the Eighth Amendment. It also seems plain that the death penalty, in appropriate circumstances, is consistent with modern American social values, based on the broad acceptance of the death penalty in the United States. But Professor Koh is correct that many countries, particularly in Europe, reject the death penalty as a matter of moral and social policy.[29] The question is whether and how we should take that into account.

As indicated above, I think it appropriate for Americans to consider Europe's abolition of the death penalty in deciding whether we should retain it. The key, though, is that the *legislatures* (and the people, acting through their legislatures) should consider it, not the courts. The courts' role is limited to deciding whether the death penalty is consistent with the meaning of the Eighth Amendment—either its original meaning, or, in some versions, its "evolving" meaning as informed by the evolving values of American society. Europe's current view of the death penalty as a matter of moral and social policy does not inform the original meaning of the Eighth Amendment nor the values of modern American society, and so should not figure in the courts' view of the Eighth Amendment. Professor Koh's suggestion that we give consideration to Europe's views is correct, but addressed to the wrong forum. The decision whether or not to *change* American moral and social policy to abolish

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[26] *Stenberg* v. *Carhart,* 530 U.S. 914 (2000); see Roger Alford, Misusing International Sources to Interpret the Constitution, ___Am. J. Int'l L.___ (forthcoming 2004).

[27] See Diane Marie Amann, Raise the Flag and Let it Talk: On the Use of External Norms in Constitutional Decisionmaking, 2 Int'l J. Const. L.___ (forthcoming 2004). Professor Amann predicts, as I do, that courts will likely behave in this way, adopting "external norms" (i.e., foreign views of moral and social policy) that they like and discarding those they do not like, in an essentially legislative fashion. We differ on whether this is appropriate.

[28] Harold Hongju Koh, Paying "Decent Respect" to World Opinion on the Death Penalty, 35 U.C. Davis L. Rev. 1085 (2002).

[29] It is worth noting that Professor Koh's use of foreign materials is—like the Court's—selective. The death penalty has not been abolished in all countries, including in liberal democracies such as Japan. Moreover, polls suggest that in Europe the death penalty is much more popular among the ordinary population that among elites. See Crime Uncovered, The Observer, April 27, 2003 (reporting poll showing 67% in Britain support re-introduction of the death penalty). Moreover, I doubt Professor Koh would endorse using foreign materials to guide courts' decisionmaking on abortion or criminal procedure matters where the United States is more protective of rights than other nations.

the death penalty may take into account Europe's view—but that decision should be taken by legislatures, not courts.

For these reasons, I think it is important for courts to limit their use of foreign materials to situations in which the foreign materials are clearly related to interpretive questions of a particular text. When courts use foreign materials to support freewheeling explorations into moral and social policy, they exceed the judicial role.

Mr. CHABOT. Thank you, Professor.

And our final witness this morning will be Professor McGinnis.

STATEMENT OF JOHN OLDHAM McGINNIS, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, CHICAGO, IL

Mr. MCGINNIS. Thank you very much, Mr. Chairman. I'm very grateful to be here today on I think a very important issue. I'd just like to make a few points to emphasize and to perhaps disagree with certain points that have been made.

First of all, I think it is very much that this Committee and this Congress has complete authority to pass a resolution offering its own opinion on how the Constitution should be interpreted. I think, in fact, the Congress should do more of that. The Congress has an independent authority to interpret the Constitution for the courts. Of course, the Congress cannot prescribe or change the way a court is going act, but that doesn't mean that it's not valuable for the Congress to offer its own opinion on how the Constitution should be interpreted. Indeed, it's more—they have done so in the past on things like the Pledge of Allegiance case, but it's more important in something like this, a cross-cutting issue across constitutional law that raises questions about the first principles of our republic. So I think there is no doubt the Congress has authority to do this.

Secondly, I think there's also no doubt that this is a serious problem that the courts are using and are thinking of using more often in the future a foreign and international law as perhaps outcome determinative precedent in U.S. constitutional cases, and I think one can cite the speech that the Chairman cited. In fact, I would refer to Justice O'Connor's speech and quote this language: After discussing the *Atkins* case in *Lawrence* v. *Texas*, she said about those cases in ruling that consensual activity in one's home is constitutionally protected. The Supreme Court relied upon, in part, on a series of precedents from the European court, and I suspect that we're going to do so more in the future, relying on the rich resources available in the decisions of foreign courts.

The term "relied upon" I think suggests that these kind of precedents can be outcome determinative. If they are mere decoration in opinions, then I think the Court wants to be very careful and clear about that these are not going to influence the actual outcome; otherwise, I think the Court's decisions become less transparent to the public.

The question of why we should not use contemporary foreign law to interpret the Constitution I think relates in part to the proper way of interpreting the Constitution. The Constitution should be interpreted according to its original understanding. It would be very rare that contemporary foreign law could be relevant to that inquiry of what is the original understanding, and therefore I would distinguish the uses of international law in the 19th Century. Often international law at that time, when it grew up right

around the time of the Constitution, could be useful to understand the meaning of the Constitution.

Moreover, I think the use of the international or foreign law in the Federalist Papers really proves the point here. After all, the Federalist Papers were advocates for the Constitution. They were really acting to persuade the ratifiers to ratify the Constitution. Surely, it would be completely appropriate for Members of Congress to refer to international decisions if they ask their colleagues to pass a statute. That's quite a different use of foreign law than to use it in the course of interpretation of the Constitution.

I just add three final points that I'd like to emphasize about why I think there are risks, really quite pragmatic risks, about using our foreign law to interpret our constitution. One that's been discussed previously is the additional discretion it gives to Supreme Court justices. They can pick and choose the kinds of decisions that they would like to support their case, and that is problematic.

But there are two other things that I think have not really been focused on that I think are equally problematic with using foreign law. One is the idea that foreign law may seem like an American law, but is really very different, and that's exemplified by *Lawrence*. As Professor Rubenfeld of Yale University has pointed out, European human rights law really proceeds on a whole different theory from American law. It really proceeds on a natural law theory, something that is going to be imposed quite on the people, whereas our own human rights have really been actually produced by the people in the deliberative process of ratifying the Constitution; and our system also has a lot more emphasis on federalism, a lot more emphasis on decentralization and competition in human rights law and, again, not the kind of centralized imposition, typical of Europe.

And, therefore, it can be quite misleading to try to transplant the European decision into the American context, because we have a whole set of different institutions for creating norms. I'm not at all suggesting that the European system isn't good for them, but it's not necessarily good for us. It's a mistake to look this tip of the iceberg of a whole complex structure of government and then translate it over into our law.

The final point is that ultimately too much reliance on foreign law has the potential to alienate our citizens from their own constitution. It's "we the people" who have constituted our constitution, and that's more than a formal point. Our citizens' affection for their own constitution is one of the things that keeps our republic stable. In the 19th Century, that affection was expressed, actually, through parades in the street in favor of our constitution. That may be a little harder to get in an age of C-Span, to get people to parade in favor of their constitution, but that affection for their constitution is still crucial to maintaining the stability and their interest in the Constitution.

There's a risk of citing these foreign cases and relying on these foreign cases. That might seem very chic to the cognoscenti, but that cosmopolitan style comes with a price. It comes with a price of alienating the affections of the citizens on whom constitutional government ultimately depends.

Thank you very much, Mr. Chairman.

[The prepared statement of Professor McGinnis follows:]

PREPARED STATEMENT OF JOHN O. MCGINNIS

Thank you, Mr. Chairman, for inviting me to participate in this hearing on the important subject of the federal judiciary's use of foreign or international law to interpret the Constitution and other laws.

First, I want to make clear that this House has the authority to offer its own opinion on the relevance of foreign or international law to constitutional interpretation, or for that matter, any other contested subject of constitutional interpretation. Congress's duty to share its independent interpretation of the Constitution flows directly from a system of separated powers, designed in part to ensure that each branch has the opportunity to correct the mistakes and excesses of the others. There is no area in which such a self-correcting mechanism should be given freer play than in the interpretation of a constitutional republic's fundamental document. As James Wilson, Framer of the Constitution, Justice of the Supreme Court, and first law professor of the republic, stated, "[t]here is not in the whole science of politicks a more solid or a more important maxim than this—that of all governments, those are the best, which, by the natural effect of their constitutions, are frequently renewed or drawn back to their first principles."[1] By holding a hearing on whether it is appropriate to use contemporary foreign law as a source of authority in constitutional law, this Committee is directly contributing to conserving the first principles of republican government.

This hearing, however, is not prompted simply by the academic question of the relevance of foreign and international law to constitutional interpretation. In the recent case of *Lawrence* v. *Texas*,[2] the Supreme Court held that the due process clause protected a substantive right to sodomy and relied upon a case from the European Union as persuasive authority for that result.[3] After citing the case, Justice Anthony Kennedy, writing for the majority, pressed the European analogy:

> The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[4]

Thus, the question I want to address is whether the Court should use foreign or international law as persuasive authority in interpreting our own Constitution. I believe that subject to certain caveats the Court should not use foreign law or international law and that its use in *Lawrence* is exemplary of all that is wrong with such an approach to constitutional interpretation. I should note that this question is entirely separate from the question of whether *Lawrence* was rightly decided and certainly separate from whether laws against sodomy are wise. I, for my part, think such laws are unwise and should be repealed.

One straightforward argument that rules out most use of foreign law in constitutional interpretation is that in almost all cases it is inconsistent with the correct way of interpreting the constitution—interpreting the Constitution according to its original meaning. Obviously, I cannot provide a complete defense of originalism here, but two important factors powerfully favor its soundness as a method of constitutional interpretation. The first argument for originalism derives from the reasons that justify giving a provision of the Constitution priority over a statute when the two conflict. A constitutional provision has a greater presumption of beneficence than a statute because it commanded broader social consensus, having had to pass supermajoritarian hurdles to be enacted.[5] But that beneficence depends on the meaning that the ratifiers of the constitutional provision attached to it. It was this meaning that commanded the widespread consensus that permits it to trump statutes passed by contemporary majorities. Therefore only by employing the original

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[1] *See* 1 THE WORKS OF JAMES WILSON 291 (Robert Green McCloskey, ed., 1967).

[2] 123 S.Ct. 2742 (2003).

[3] The case was *Dudgeon* v. *United Kingdom*, 35 Eur. Ct. H.R. (series A) 1981. Some have argued that this citation was simply a response to the claim in *Bowers* v. *Hardwick* that homosexual conduct has never been tolerated in Western civilization. Neither the majority opinion in *Bowers* nor Chief Justice Burger's concurrence, however, made any such claim. In any event, the best interpretation of the language quoted is that the Court is citing this as persuasive precedent for its own holding.

[4] 123 S. Ct. at 2483.

[5] John O. McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 791 (2002).

meaning of a constitutional provisions are judges justified in invalidating statutes enacted by democratic majorities.

The other primary argument for originalism focuses on the institutional competence of the judiciary. It parallels the argument for democracy itself. Originalism is the worst system of interpretation except for all the others. While sometimes it is difficult to discern the original meaning of the constitution because of the passage of time, at least the inquiry into historical meaning requires judges to engage in disciplined search for objective evidence and to consider the purposes of others rather than their own. As such, originalism constitutes a break on judicial wilfulness and subjectivity—tendencies that deprive the judiciary of the comparative advantage they hold over other political actors in constitutional interpretation and therefore undermine the justification for the judiciary's power to invalidate statutes through judicial review.

Moreover, originalism is the default rule we apply to interpreting any historical document. If a historian wanted to understand the meaning of the Mayflower Compact, for instance, he would obviously consult sources available to those who wrote the document in 1620 rather than contemporary sources. However, if we abandon this common default rule of interpretation, there are scores of current interpretative theories from which to choose and many others that surely will be advanced by scholars yet unborn. Originalism is thus the only theory that provides a solution to the coordination problem of constitutional interpretation. If our Constitution is a common bond, we need a common way of understanding it and that common understanding can only be provided by the default rule of interpretation that we generally apply to historic documents.

For similar reasons, statutes are to be interpreted according to the meaning a reasonable observer would have attached at time of their passage. The broad acceptance of this theory of interpretation of statutes in fact provides further support for originalism in constitutional law. I am sure members of this committee who labor long and hard over the details of statutes would want them interpreted as its members would have reasonably understood them at the time of enactment. Why should we have a different theory of interpretation for statutes than for the Constitution? Mere age cannot be distinction because many statutes are almost as old as the original constitution and a good deal older than the more recent constitutional amendments. Moreover, the passage of time does not the erase the meaning of historic documents anymore than it erases the meaning of the documents we write in our own lives.

Accordingly, I entirely applaud the premise of the resolution that is subject of this hearing. Orginalism which calls for ascertaining the meaning that a reasonable observer would have to attached to a law at the time of its enactment is the correct theory of the constitutional and statutory interpretation. If orginalism is the right interpretative theory of the Constitution, there will be little occasion to use contemporary foreign precedent as persuasive authority because contemporary foreign precedent would not generally cast light on what a reasonable person at the time of ratifying the Constitution would have understood to be its meaning. Precedent from the United Kingdom or elsewhere known at the time of the Framing could have been relevant because some provisions of the Constitution might be have been understood in terms of such precedent. But the use of such precedent to establish the Constitution's historic meaning is not the issue here.

Within an originalist theory of interpretation there are two other possible proper uses of foreign and international precedent. Resort to contemporary foreign or international law might be proper if the original Constitution calls for reference to contemporary foreign or international law. The Constitution may do this in limited circumstances as when it permits Congress to "define offenses against the law of nations."[6] Even here it is significant that Congress is the body called upon to mediate the relation of international law to law in the United States—not the courts. Similarly, of course, interpreting treaties which are contracts among nations may require attention to foreign and international precedent as a matter or course. Once again under the constitutional provisions for treaty making the political actors rather the courts are choosing to bring international law into our domestic regime.

Finally, foreign law could be relevant to prove a fact about the world which is relevant to the law. For instance, it might be useful to evaluate an assertion that one consequence follows from another, because one could show that in some legal systems the consequence does not always. follow.

I would thus modify the resolution to make clear that these uses of foreign or international law are legitimate. But none of these possible legitimate uses of foreign law detract from the main thrust of this resolution which is designed to pre-

[6] U.S. CONST. Art 1, sec. 8.

vent the use of contemporary foreign or international precedent as persuasive authority as matter of course in our interpreting our domestic constitution. I would also modify the resolution to address questions of the use of foreign and international law only in the context of constitutional interpretation, because contemporary foreign and international law may well serve as a backdrop to statutes, such as those relating to international trade, and thus be often relevant to their interpretation. While the resolution by its terms does not rule out such use, I think it would be better served to focus on what may be a growing problem of abuse of foreign law in constitutional interpretation rather than statutory interpretation where the problem seems to be less acute.

Even if one does not accept an originalist theory of Constitutional interpretation, substantial pragmatic problems militate against relying on contemporary foreign and international law as sources of constitutional authority. Therefore even those not disposed favorably toward originalism should be skeptical of the use of foreign law as persuasive authority.

First, the Constitution contains no rule as to which of the many bits of conflicting foreign rules of law should be used as persuasive precedent. Judges therefore are likely to use their own discretion in choosing what foreign law to apply and what foreign law to reject. Judges will use foreign law as a cover for their discretionary judgments.

Lawrence exemplifies this problem. While the European Union protects sodomy as a constitutional right, many nations still criminalize sodomy. Why should the Court look to the European Union and not these other nations? Perhaps the claim is that we share values with the European Union. But this a very vague rule requiring agreement on what values are relevant. We actually do not share all values with the European Union, as the war in Iraq showed. How do we do know we share their values about the appropriate way law should regulate sexual behavior?

Unfortunately, the *Lawrence* Court never answers this question. It instead simply felt free to pick and choose from decisions around the world the ones that it likes, to use them as justification or at least decoration for its own ruling, and to ignore decisions that are contrary. It is hard to think of a more *ad hoc* and manipulable basis for interpreting the United States Constitution.[7]

Second, the problem with using foreign decisions is that they are the consequence of a whole set of norms and governmental structures that are different from those in the United States. They may be appropriate for their nations but out of place in nations with different government structures. Lawrence's use of the EU decision is once again exemplary. European traditions are more favorable than American traditions to the imposition of elite moral views. Indeed, the European notion of human rights in constitutionalism is fundamentally different from ours: human rights in Europe are the product of a search for eternal normative truths to be imposed against democracy.[8] This is quite different from the American conception of rights as products of democracy, albeit of the special democratic processes that produce the state and federal constitutions and their amendments.[9] Moreover, the United States has a structure of federalism and more general traditions of decentralization that are important processes for testing the content of rights.

Thus, foreign constitutional norms do not just reflect certain views about the content of substantive rights but also a foreign mode of defining them. Any judicial opinion from another culture is the culmination of a complex institutional structure for producing norms. The low cost of accessing the mere words of a foreign judicial opinion can blind us to the fact that we are only seeing the surface of a far deeper social structure that is incompatible with American institutions. This does not necessarily mean that the American political system as a whole is better than that of some others, but it does caution against assuming that judicial decisions from other nations will produce the same good effects here that they may produce in a significantly different political system.

Third, promiscuous use of foreign law will undermine domestic support for the Constitution. The Constitution begins: "We the People . . . do ordain and establish the Constitution of the United States." In a formal sense, the entire Constitution is an expression of the views of the people of the United States, not some other people. Relying on international or foreign law except when the Constitution directs us to look at the law flouts this first principle. This formal points has social implica-

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[7] The Court may be headed in this direction, not only in substantive due process, but in other areas as well. *See* J. Harvie Wilkinson III, *International Law and American Constitutionalism* 12 (forthcoming 2004) (wondering what principle judges can use to decide which foreign decisions to cite).

[8] *See* Jed Rubenfeld, *The Two World Orders*, Wilson Quarterly, Autumn 2003, at 23.

[9] *Id.*

tions. The Constitution has commanded respect and allegiance because it our Constitution, not a document imposed from abroad.

This is not a small point but goes to the heart of the stability of a political system. A Constitution cannot be maintained simply by self-interest, because the citizens would then free ride on the efforts of others. Thus, if self-interest is the only perspective that individuals have toward constitutionalism, the attitude adopted will be one of at most benign neglect: let others create the climate of watchful respect for constitutional fidelity that is necessary to preserve the constitutional order. One important feature of the American tradition that overcomes the potential constitutional tragedy of the commons are the bonds of affection that citizens have for their founding document. In the nineteenth century, this affection was marked by parades and celebrations. In our own time which has more distractions, the sense of public affection is no less important but harder to express. If foreign decisions become a routine source of constitutional law, citizens, except for the most cosmopolitan, will lose identity with the document. The emphatically American nature of our Constitution has been a source of affection and pride that have contributed to our social stability.[10]

I want to close by discussing an argument that some may deploy to suggest that quite a bit of foreign and international law should be used in interpreting the Constitution. It is the claim that some clauses of the Constitution themselves contemplate an evolving meaning and foreign law can help chart the course of this evolution. Thus, the Supreme Court itself appears to interpret the cruel and unusual punishment clause in light of evolving standards of human decency rather than the standards at the time the clause was framed. It is in this context that the Supreme Court in *Atkins* v. *Virginia* cited to the worldwide community's general refusal to execute the cognitively impaired as evidence that evolving standards demand that the United States end such executions.[11]

Let us assume for a moment that the cruel and unusual clause should be tied to evolving standards in general It does not follow that the Framers would have wanted to tie these evolving standards to the standards of other nations around the world rather than focus only on domestic evolution. At the time the Constitution was framed the United States was one of the few republican nations in the world and the Framers often distinguished its practices from the world's ancien regimes. It seems very unlikely that given the self-conscious exceptionalism of the United States that the Framers would have wanted make the standards of our Bill of Rights depend on the practices of other nations. They would have no confidence that those standards would not represent retrogression rather than progress. Thus, not only do I find no evidence that a reasonable person would have understood our Bill of Rights to incorporate the evolving standards of foreign nations, the argument seems implausible on its face.

Lawrence's reliance on the law of the European Union to help interpret our Constitution was a mistake. Unfortunately, if accounts of Supreme Court Justices' remarks favorable to the reliance on contemporary foreign law in constitutional interpretation are accurate, Lawrence's error may not be an isolated one.[12] Passing this resolution, as revised along the lines I suggest, would therefore be a warranted expression of correct constitutional views and a respectful suggestion that the Court reconsider use of contemporary foreign law as persuasive constitutional authority.[13]

Mr. CHABOT. Thank you, Professor.

And now the Members of the panel will have 5 minutes to ask questions. I will first recognize myself for 5 minutes for that purpose, and I would direct this question to any of the panel members that might like to answer.

Assuming the views that the "world community" should be considered when interpreting American law, what principle, if any, would exclude the consideration of the policies of, say, Communist China whose population alone includes nearly one-quarter of the

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[10] See Wilkinson, *supra* note 7 at 8. (suggesting that too much citing of foreign law will make the Justices seem out of touch with American culture).

[11] *Atkins* v. *Virginia,* 534 U.S. 304, 317 (2002).

[12] *See* Remarks of Justice Sandra Day O'Connor, Southern Center for International Studies, *http://www.southerncenter.org/OConnor—transcript.pdf* (seeming to urge greater reliance on foreign law in United States constitutional interpretation.

[13] Parts of this testimony are based on Nelson Lund & John O. McGinnis, *Lawrence* v. *Texas and Judicial Hubris* ___Mich. L. Rev.___ (2004).

entire world's population? I don't know, Professor Rabkin, if you might have an opinion about that. Then we can go down the line.

Mr. RABKIN. You know, I was going to hold back for the hard questions. That is not a hard question. It just shows that it's silly. When they talk about the world community, what they mean is their friends in Europe and also in Canada.

Mr. CHABOT. Okay. Professor Jackson.

Ms. JACKSON. I think it's a good question. As I tried to say earlier, I think that it can be helpful to interpretation to examine sources both to discern what we agree with and the discern how we are different, and if a lawyer were to bring to the Court a citation—I'm not aware that the People's Republic of China actually has a constitutional court. I don't think they have judicial review. I don't think they provide the kind of protection for rights that we value so highly. But if a lawyer were to cite something, you know, I think you might ask is it like Justice Jackson telling us about the Weimar Constitution so that we know how to construe ourselves differently, so that different kinds of sources will be used for different things, and should be, depending on their context.

Mr. CHABOT. Thank you.

Professor Ramsey or McGinnis?

Mr. RAMSEY. Well, interestingly, in *Atkins*, the death penalty decision, one of the amicus briefs did cite the practice of the People's Republic of China and stated that the People's Republic of China did not execute mentally retarded offenders as one of the reasons why we should also not. Unfortunately, they got that statement wrong, as near as I have been able to determine. Actually, Chinese law does not exempt mentally handicapped offenders, but, nonetheless, they did make the citation.

My answer to your question is there is no principle basis. We may be able to say at the extremes that our values are close to those of, say, England and very far from those of, say, Somalia, but I think that drawing any kind of a principle line is going to be very difficult, especially when you start talking about countries that are large, prosperous, rights—enjoying democracies, but not out of exactly the same tradition as ourselves or at least some of our people, such as India, China—India, Japan, Thailand, Philippines. Those countries, we have many things in common with, many things not in common with. I would not like to see an argument to the Supreme Court where the lawyers took adverse sides on whether countries such as those were appropriate moral precedents, and I don't think there's any principle way to draw a line.

Mr. CHABOT. Thank you.

Professor McGinnis, anything?

Mr. MCGINNIS. I would just associate with myself with Professor Ramsey's remarks.

Mr. CHABOT. Okay. Thank you very much.

Let me ask, Professor Jackson, if I could ask you a question. You started out at the outset by saying that you're opposed to this resolution, and it would simply express the view of the House of Representatives. We've not taken the step of using our authority to alter the lower Federal courts under article I, section 8, for example, or to alter the appellate jurisdiction of the Supreme Court on

our article III, section 2. That step might be appropriate in the future, but we have not taken that step here.

Regarding the resolution, however, doesn't the House of Representatives or shouldn't the House have the right to express its views in a formal fashion as we're attempting to do here?

Ms. JACKSON. Well, I certainly think that Members of the Congress have a perfect right to express their views on issues of constitutional law and issues of constitutional interpretation. These issues concern all branches of government and all citizens.

What concerns me, Mr. Chairman, about a collective resolution from the House of Representatives is the fact the House of Representatives—that the Congress, of course, controls to some extent the jurisdiction of the Federal courts. The Congress is also the body in power to impeach and remove from office the justices, and my concern is that a resolution of this nature begins to trench on the courts with respect to the interpretive process; and if there is anything that I would think was a core judicial function for the courts, it is how to interpret.

And so it is those factors that lead me to be very concerned about the proposed resolution.

Mr. CHABOT. Thank you. One final question, Professor Rabkin: Could you comment on the implications relative to sovereignty if this transnational constitutional trend would take root in our courts?

Mr. RABKIN. Yes. That's a question I was waiting for.

Mr. CHABOT. Excellent.

Mr. RABKIN. Thank you.

The premise of this trend is, I think, very clearly subversive of the whole concept of sovereignty, because what it's saying is there are right answers to how things should be done, and all we need to do is to canvass the wise men and women of the world wearing robes, and then we'll find out what is the right answer and we'll implement it, and sometimes we'll learn from the wrong answers that the mistaken countries have done. But we're in this process of international dialogue among judges to find the right answer.

Now, the premise of that, if you think it through, is that we already live in a world community which is united in this common search for right answers, and if that is true, then sovereignty is pointless, and not only pointless, because we could trust judges of the world to tell us how to live so we don't have to make a big fuss, but not only is it pointless, but sovereignty then starts to look like something which is a dangerous obstruction to the process, because who are we to insist on our distinctive ways? Because the community of the wise have agreed that it should be this way. So we can't just drag our feet and say, "No, we're doing it differently because we're ornery Americans." That looks selfish. That looks blind. That looks bigoted.

So I don't think there's any question at all that there is a conflict between the notion of sovereignty, the moral claims of sovereignty, and the moral claims of these things.

Mr. CHABOT. Thank you, Professor.

The bells here mean that we have a vote, but I think we have time to go ahead with one more set of questions here. So the gentleman from California, Mr. Schiff, is recognized.

Mr. SCHIFF. Thank you, Mr. Chairman. I have to say I'm very struck by this discussion and several others that we've had in Committee and on the House floor, just how far we've come, I think, in a very negative direction when I look at some of the language that's being used in the memorandum, the majority memorandum, in preparation for this hearing today which describes this nation facing, "a judicial crisis in which judges are increasingly abusing their power as lifetime appointees and failing to faithfully interpret the laws by following their original meaning."

Further language: "An equally alarming trend is becoming clear. Judges in interpreting law are reaching beyond even their own imaginations to the decisions of foreign courts." Later discussion of this: "If unchecked, this will produce a further erosion of American sovereignty." The professor talks about—uses the word "subversive."

You would think we're talking about a wildly liberal activist Supreme Court in the country, and it must be a different court than I'm familiar with. Where is this judicial crisis that we're concerned about?

I think this resolution, this discussion, says a lot more about the strained relations right now between the Congress and Europe, between the Congress and the Court than it does about a few what appear to be relatively isolated cases of judicial opinions citing some foreign source of authority. There are a great many things that find their way into judicial opinions. There are references to popular culture, references to TV, to movies, to probably expressions like "Where's the beef?"

Are we going to resolve that courts should not cite these instances of popular culture or well-known literature because that is not what Congress was intending when it drafted the statute under interpretation? It also probably says something about certain decisions that a number of Members, maybe a majority of Members, don't like the result of those decisions.

But more than anything else, I think what this discussion and the resolution do is they provide a shot across the bough of the judiciary. This is simply a shot across bough, and I think we have to ask ourselves why are we shooting across the bough of the judiciary, and we are shooting across the bough in many directions, in many fashions. We are shooting across the bough when we threaten to subpoena the records of Judge Rosenbalm who comes before the panel and expresses what's an unpopular opinion with the panel. We shoot across the bough when we use the word "impeachment" in reference to the citing of foreign opinion. We shoot across the bough when we make massive reforms of the sentencing laws without allowing for the input of the judicial conference or the judges.

And the trend is a very negative one, in my opinion, and for this Congress that approves of agreements like chapter 11 of NAFTA which effectively allow other countries to challenge American laws, to raise such a fuss about the threat to our sovereignty posed by these isolated references when the threat to our sovereignty posed by interpretations of chapter 11 is so much more extraordinary is really striking to me. Now, that's not to say that we don't have the

power to do it. We do. We can legislate away our sovereignty, and occasionally we have.

The courts are not in the same position. They don't have the same latitude to precedent away our authority, and perhaps many of the foreign references that have been cited here are not references I would make if I were a judge. But that we have decided to showcase this issue, attack this, I think is part of a broader and more disturbing trend that is probably more significant than these isolated references to foreign opinion.

So I really don't have as much a question for our witnesses as this comment to make, and that is we are on a downward trajectory of our relations between the two branches which is not good for the Court and is not good for the Congress, and I would hope we would find other ways than resolutions like this to try to repair that relationship.

And I'll yield back the balance of my time.

Mr. CHABOT. The gentleman yields back.

At this time, we have a series of votes on the floor. We have a 15-minute vote and three 5-minute votes following that. So we're probably looking at a little more than a half hour before we can make it back here.

So we will be in recess until we come back. As soon as our Members are back, we'll get started again. And we thank the panel for their indulgence there.

So we're in recess for a short period.

[Recess.]

Mr. CHABOT. The Committee will come back to order.

The gentleman from Florida, Mr. Feeney, one of the principal sponsors of this resolution, is recognized for 5 minutes.

Mr. FEENEY. Thank you, Mr. Chairman, for holding this hearing, and I want to thank all of the witnesses. I'm grateful today; Professor Rabkin, you gave some testimony I very much appreciated. I read your comments. I would suggest, however, that we not ridicule this idea of a global law, because if you combine Conte's philosophy of an international peaceful democratic entity along with Plato's suggestion about how we best govern our ourselves with philosopher kings in charge, you've got exactly what we are slowly moving to, in my view. So there are some great rationale for it. It's just not anywhere in our Constitution, in my view.

And I really wanted to ask the panel a couple of questions. Professor Jackson, I appreciate your being here especially. It's not easy selling new ideas, but not every new idea is a good idea. So we will be interested in your perspective, because the other panelists, for the most part, seem to support the resolution.

But I would ask maybe the panel to comment on a couple of things and one question specifically for Professor Jackson. When Justice Ginsburg sort of justified in a speech the increasing use of foreign law—I think the speech I'm referring to was to the American Constitutional Society, entitled "Looking Beyond Our Borders, August 2, 2003"—she mentioned the Declaration, and you did as well in your discussion as sort of a justification for how we ought to—I think you referred to "have a decent respect for the opinions of mankind," but you'll recall, and I think Justice Ginsburg actually acknowledges it, but in your testimony, written, you don't, the

entire reason Jefferson and his friends included that phrase, a decent respect for the opinions of mankind, was to say that as we dissolve our political ties to another State and as we assume our separate and equal station among the world powers and as we declare ourselves separated, because we have a decent respect for the opinions of mankind, we're going to explain to the rest of the world why we are separated, not incorporating their law, not acknowledging their law, but separating from it. And then, of course, later in a phrase that Representative King cited, one of the reasons we are separating is, of course, we don't want to subject ourselves to jurisdiction foreign to our constitution and unacknowledged by our laws.

So I think it's a little bit disingenuous, candidly, to use that specific phrase of the important expression in the Declaration.

With respect to the Constitution or the Declaration or even the Federalist Papers, I would like any of the panelists to give me an expressed provision that they think justifies the importation of foreign laws to determine the original meaning. Remember that's the phrase in the resolution. If you can find any, I would like to see it.

Professor Jackson, you refer to Federalist 63, but of course that is suggesting to Congress that we ought to pay attention to foreign countries, and I happen to totally agree with that. We're talking about whether our courts ought to.

And then the other thing that I would like, Professor Jackson, if you would address, because on the one hand, your comments seem to say what the courts are doing is not really new. I don't want to get into the details, but virtually all of the cases you cited either involve international law, international vessels, in one case, the sovereign community, the Native Americans, and so it's perfectly appropriate and would not only not be prohibited, but actually endorsed by the revolution that I've sponsored to do all of what historically you cited justices did until the last 20 years.

It is the new stuff that we're very concerned about, and I'm very concerned that one of things—you say on the one hand, nothing new is happening, but on the other hand, in your comments you suggest that it is appropriate for our courts since some countries endorse or ratify or adopt parts of our laws or Constitution. Then there is new a interpretation that their justices have. You think it's appropriate for our courts to adopt their new interpretation.

Finally, I would like to challenge all of the witnesses today, and I'll close with this, Mr. Chairman, by my quick summation, creating new law based on what foreign countries are doing, their constitutional law in courts, in my view violates at times articles I of the Constitution, because it usurps our legislative authority; violates article II, because it prohibits a presidential veto of new law; violates article III—violates article IV with respect to guaranteeing a republican form of government, because nobody is permitted to vote for the justices that are making this law by reference to foreign law; violates article V, the treaty provisions, because we end up at times basically ratifying agreements with other countries even though neither the legislature nor the President was involved in this new treaty; and, finally, violates article VI, the supremacy clause.

So my challenge to the professors is can you identify anything in article III that may be violated by creating new law by reference, because I haven't been able to yet, and you've got better background in this than I.

Thank you, Mr. Chairman.

Mr. CHABOT. The gentleman's time has expired, but the witnesses can respond to the questions as they would so choose to do so. I guess most of the questions were directed at Professor Jackson.

Ms. JACKSON. Thank you, Congressman Feeney, for your questions. I'll try to respond to them.

I certainly didn't mean to be disingenuous in referring to the Declaration. I think my remarks made clear that I think that foreign law and practice can help us both understand how we are separate, and there are many uses in the U.S. reports in which the Court says, "Well, they did it that way in England and we want it to change. There are also other places in the U.S. reports where the Court says we are trying to protect the same rights that Englishmen had and in which British cases and practice are used to inform our understanding of what our law is.

But I think the Declaration of Independence is also relevant in another respect here, if I may. The second paragraph of the Declaration begins with the statement that "there are certain truths that are self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights." And while the Declaration of Independence, of course, is not our Constitution, I think it is not unreasonable to look at some of the rights-protecting provisions in our Constitution as a written effort to provide protection to rights that were understood to attach to all people by virtue of their being people.

And so to that extent, some, at least, of the rights-protecting provisions in the U.S. Constitution are designed to protect rights that are widely shared, that should be understood to attach to human beings, and thus I think it is reasonable to think that we could learn something.

I want to resist the language of importing foreign law, because I don't think that's what the Court did in *Lawrence*. I think the Court referred to foreign law in much the same way that it referred to the decisions of five State courts in the United States, which the Supreme Court in *Lawrence* said since the *Bowers* decision had rejected the Supreme Court's reasoning about the Federal Constitution to reach a different decision under their own State Constitutional law, which can be different from the Federal Constitution as long as it doesn't violate the Federal Constitution. These are legal sources that are not binding, and I think that's an important point, but that illustrates how other courts thinking about similar problems have resolved them and, in that sense, I think are helpful.

Let's see. On the Federalist Papers, absolutely right. Federalist 63 was directed to the Senate and the benefit of the impartial counsel that sometimes one might get from other countries and sometimes I'm sure not, but in Federalist 79—I'm sorry—Federalist 80, there is a discussion about the need for the judicial power to be broad enough to resolve disputes in which foreign nations might have an interest. Now, that passage doesn't talk about how the

court will do it, but, as we know, our early court did invoke the law of nations in many cases.

It is true, Congressman Feeney, that in the last——

Mr. FEENEY. With unanimous consent, Mr. Chairman, that Federalist 80, as I recall, is an explanation of the original jurisdiction delivered to the Supreme Court. So, again, it is pursuant to the Constitution that the U.S. Supreme Court has jurisdiction of those cases. This is not some new understanding that the Constitution or the Federalist Papers are suggesting.

Ms. JACKSON. It's an explanation of the reasons why the jurisdiction was extended, because of a concern that our courts be able to deal with disputes in which either foreign subjects or citizens or foreign nations had an interest. There is something new in that international law, particularly in the period since World War II, has become concerned, as many nations were, with the kind of gross abuses of human dignity that we saw during World War II. And beginning, really, in cases in the 1940's, the Supreme Court of the United States, in explaining our concepts of liberty (that's what I think is going on, is what do we understand our constitutional concepts of liberty and equal protection to refer to) began using the term "human dignity." Now, this is a new term, but it wasn't—I don't think of it as importing something foreign, but rather expressing the justices' understandings informed by what we and other countries in the world saw happen when basic human rights were trampled.

Mr. CHABOT. The gentleman's time has expired. Did you want to sum up what you wanted to say in response, Professor, or do you want us to move on to another questioner?

Ms. JACKSON. I probably have said enough, but the basic point, Mr. Chairman, is that what I see the Court doing with these references is trying to get the best understanding of the concepts involved in order to give the best interpretation to U.S. law.

Mr. CHABOT. Okay. Thank you.

The gentleman for Iowa, Mr. King, is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

As I sit here and listen to this testimony today and I get a chance to hear the feel for some opinions which I dissent with and begin to reflect upon how this fits within the larger view and what can happen if we allow this to flow along and some of the other values that are around this world that might be chosen from the great menu of case law that's in this world today and I think in particular the case of *Lawrence* and what might happen if there were a particularly rigid justice that might decide to take some case law from other countries, other countries that have an exactly divergent view from that which is reflected *Lawrence*, in fact, countries that execute people for that behavior, and so I think it's really dangerous to go and borrow from somebody else's set of values when we have a body here and a number of our legislative branches from our political subdivisions all the way here to Congress that reflect the values of the United States of America.

In fact, I almost hear a presumption that foreign courts are more enlightened in some cases than we are here. And so, you know, I would argue that in the case of *Lawrence* v. *Texas* that the 10th amendment was set aside in preference to other case law from

other nations, in part at least, and that is something that is chosen, again, from the menu of preferred result, from my view, and I would also argue that in the case of *Grutter* v. *Bollinger* that the 14th amendment was set aside in preference for an idea that is written clearly in that majority opinion, and I'll describe it this way: that skin color has academic value as defined by diversity, not human experience, not diversity of human experience, but diversity itself as defined by skin color has an academic value that the university can only define when they reach this surrealistic critical mass that gives it the academic value, and only they can be the judge of that.

Now, I cannot for the life of me connect that kind of a definition to the Constitution itself or any Federal statute that we have, and so I'm very concerned about where this goes and where this takes us if there's this much latitude, and what's at the center of my question is, and I direct it to Professor Jackson, as she probably anticipated, and that would be you raised objection to the legislative branch intervening in the separation of powers, and so my question to you would be at what point would you be willing to acknowledge that the Congress has the authority and/or should step in to redefine this line of the separation of powers?

Ms. JACKSON. Well, Representative King, in just a point of clarification, in the *Grutter* decision, my recollection is that the only reference to foreign or international law was the reference in Justice Ginsburg's concurrence, and it concerned the idea that the Court could say something is permitted, but for a temporary period of time; and in connection with that piece, my recollection is she referred to some international documents that at least one of which we're not a party to, one of which I think we were. But I think it went to that rather than what I take to be what troubles you, which is that the Court concluded in *Grutter* that a particular consideration of race along with other factors——

Mr. KING. Let me go a little further, and in that majority opinion, I believe it was written by Justice O'Connor that we should review this in about 25 years; maybe by then, we can reapply the 14th amendment.

Ms. JACKSON. Well, you know, what equality means in any given period of time, particularly given its remedial purposes, is something that we have learned does—our evaluations of it, the Court's evaluations of it from within U.S. traditions has, indeed, changed over time.

Mr. KING. And given the short amount of time that I have, excuse me, but could you address the central question? At what point would you be willing to endorse Congressional intervention in reestablishing the separation of powers?

Ms. JACKSON. I don't think the separation of powers is put in danger by anything the Supreme Court of the United States did in the *Grutter* case, and that's the difficulty I have with the question.

Mr. KING. And what about—then let's go to *Dredd Scott* where we can agree.

Ms. JACKSON. In *Dredd Scott*, we had a Constitutional amendment in a civil war in which many people suffered greatly.

Mr. KING. And some of us believe that that's a case where the Court actually failed.

Ms. JACKSON. Many people do. The original Constitution at that time, however, had many ambiguous provisions with respect to an institution that was abhorrent and that is a deeply deplorable part of our history.

Mr. KING. So the Constitution, though, does give Congress the authority to step in and re-define this line at some point; would you concede that point, Professor?

Ms. JACKSON. I'm unclear on what line. I do not think Congress has authority to direct the Supreme Court how to interpret cases within the judicial power that the Court is deciding. I think there was a case—it's not in my statement. I'm sorry—called *Klein* v.*The United States* from the 1870's where the issue before the Court had been whether someone who had received a presidential pardon was entitled to be compensated for property taken by the northern armies. The Congress was very unhappy that the Court concluded that people who had been pardoned were eligible for this compensation. So it enacted another law that had many provisions, and it's a complicated case that I don't have time to do.

And the Court said, "Congress, you can't tell us to decide the case this way; this is for the Court to do."

Mr. KING. So one could conclude, then, from your response that you wouldn't recommend that Congress intervene at any point that you would be willing to define?

Ms. JACKSON. Not with respect to how the Court interprets the Constitution.

Mr. KING. Thank you.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from New York, the Ranking Member of the Committee, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you.

Let me begin by saying, to answer Mr. King, Congress can step in at any time to propose a Constitutional amendment. That's the only way it can do it.

Let me begin by saying that I think it is wholly improper. This resolution is wholly improper. Any resolution purporting to tell the courts that this decision was wrong or that decision was wrong—we passed a couple of them last year—I think is improper. It would be as improper as the Supreme Court saying to Congress that the bill we passed was stupid or wrong. I mean, those are both violations, it seems to me, of separation of powers.

If we disagree with a Supreme Court decision, if that decision is interpreting the law, we can change the law. If that decision is interpreting the Constitution, we can propose an amendment to the Constitution. That is our role. To simply pass free-standing resolutions saying that the Court is wrong or the Court didn't do that is as at best ultra vires and a violation of the separation of powers, and at worst, an attempt at intimidation.

I have here a MSNBC report quoting the sponsor of this resolution, Mr. Feeney, saying, "This resolution advises the courts that it is improper for them to substitute foreign law for American law or the American Constitution. To the extent they deliberately ignore Congress admonishment, they are no longer engaging in good behavior within the meaning of the Constitution and may subject themselves to the ultimate remedy, which would be impeachment."

In other words, we're threatening impeachment if we disagree with the Court. That is the definition of intimidation.

Now, I will admit, Mr. Feeney, that I am very upset with some court decisions. I am very upset with the arrogance and the usurpation of power of the Supreme Court that purported to install in office the current President of the United States who lost by over a half a million votes and stopped the count, stopped the recount, in the State of Florida. I don't propose impeaching the justices of the Supreme Court, though some of them might deserve it. I was equally disturbed by the actions of the former speaker of the Florida House of Representatives who proposed at that time that if the count went wrong, if a Gore slate of electives were to be seated by the courts after completion of a recount, he said we'll take it away from him; we'll have the State legislature take away the power to select a slate of electives from the people; we'll pass a statute; we'll give it to the legislature, and we'll see a Bush slate of electives.

Now, technically that is a problem with our current Constitution, because I think the legislature would have had the power to do that, and we probably ought to consider amending the Constitution to prevent some future legislature from doing that, but talk about an arrogance of power and a disrespect for democratic, with a small "D," rights and the sovereignty of the people, that is far beyond what any court, even the Supreme Court of the United States in the *Gore* v. *Bush* decision, which will rank up there not quite with *Dredd Scott*, but with some other infamous decisions, has ever proposed to do.

Let me ask Professor Jackson the following question: In any of the cases that we have talked about today, has a foreign source been treated by any court, by the Supreme Court especially, as a binding precedent, and did any of these decisions turn on an authority from a non-U.S. source, or were these citations buttressing the reasoning of the Court from other sources?

Ms. JACKSON. In no cases were the foreign or international sources in these recent decisions we've been talking about treated as binding. Indeed, if you read the entire opinions, they occupy very, very small parts of the reasoning. There were many other authorities, also not binding, that were referred to by the courts in their decisions, including State court decisions and on occasion even law review articles written by law professors, who much as we might like to be able to bind, lack the power to do.

Mr. NADLER. So they are cited for their logic, but not for their binding nature?

Ms. JACKSON. Yes. That is correct.

Mr. NADLER. And none of these decisions turned on any of those citations?

Ms. JACKSON. Not in my judgment, no.

Mr. NADLER. So this is much ado about nothing in your opinion?

Ms. JACKSON. Well, what concerns me is that I think that for Congress to say that judges shouldn't know about other laws and other legal systems is not conducive to the best——

Mr. NADLER. So it's worse than much ado about nothing? In effect, it's taking—it's making—it's concern about something that isn't happening, an undue reliance, because none of these decisions have turned on a foreign citation, nor have any been treated as

binding; but we're talking about perhaps coming up with Congress instructing the courts—purporting to instruct the courts which, as I said a few minutes ago, I think is improper.

Let me read you a quote from the distinguished Chief Justice, the current Chief Justice of the United States, a distinguished justice not appointed by a Democratic or liberal president, Justice Rehnquist. He wrote the following, and I would like to ask your comment: "When many new constitutional courts were created after the Second World War, these courts naturally looked to the decisions of the Supreme Court of the United States among other sources for developing their own law. They cited U.S. Supreme Court decisions. But now that the constitutional law is solidly grounded in so many countries, it is time that the United States begin looking to the decisions of other constitutional courts to aid in their own deliberative process."

Is the Chief Justice advocating something extra or anti-constitutional here, or is Justice Rehnquist being intelligent as he sometimes is?

Ms. JACKSON. I believe what Chief Justice Rehnquist recommended in those remarks, which I believe he made in 1989 and again to similar effect in 1999, is wise, not at all inconsistent with our Constitution, but indicating that we might be able to learn things, negative or positive, consistent with remarks of Judge Guido Calabrisi in the Second Circuit, who in a case a few years ago wrote about looking to learn, not to be bound, by other constitutional decisions, especially of countries that have modelled their constitutions on ours. Judge Calabresi said: "Wise parents sometimes learn from their children."

Mr. CHABOT. The gentleman is recognized for an additional minute.

Mr. NADLER. Thank you.

Let me just ask anyone else on the panel if anyone else wants to comment on Chief Justice Rehnquist's comment that, in effect, he said it is time that the United States begin looking to the decisions of other constitutional courts to aid in their own deliberative processes, that sometimes we might be able to learn, although not to be bound by the opinions of others. Any other comment on whether that's an intelligent comment or not? Professor?

Mr. RABKIN. When did he make that statement?

Mr. NADLER. He made it—I don't know. I think he made it 1989 or 1999.

Mr. RABKIN. Yeah. Well, just what I was going to say——

Mr. NADLER. The quote is from 2004. The citation is 2004, but he obviously made it before that.

Mr. RABKIN. I think the context of this matters. You know, if there were just the occasional reference to some French court decision and then a quotation from Moellier, we would say, well, that's a very learned justice, but the context now is there is a very organized, pervasive, systematic campaign to say judges in different questions should support each other in pursuing similar paths. In that context——

Mr. NADLER. Would you disagree with Professor Jackson when she said in answer to my previous question that in none of the cases cited with these foreign citations—none of the cases men-

tioned with these foreign citations—in none of the cases cited do these foreign citations bind, in other words, that they weren't cited as binding precedent and none of these cases turned on them? Do you agree with that?

Mr. RABKIN. As a description of what's happened up to now, yes.

Mr. NADLER. Thank you.

Mr. RABKIN. It could change in the future, and that's one of the things we are concerned about.

Mr. NADLER. Hasn't happened yet.

Mr. RABKIN. Has not yet.

Mr. NADLER. Thank you.

Mr. CHABOT. The chair recognizes himself for 1 minute out of order here. I'd just like to ask the other three panel members, the statement was made this is much ado about—the subject matter of this hearing is much ado about nothing or perhaps worse, would any of the other panel members like to comment on that?

Professor Ramsey.

Mr. RAMSEY. Yeah, I would. I think it's probably correct so far to say that these citations of foreign authority haven't had a substantial role in decisions that have been made; however, I think these things acquire a momentum and that major mistakes begin with very small mistakes. I'd like to real quickly give an example of a case that I think is very important. We were talking about it at the break. It involves the juvenile death penalty, that is the execution of persons who committed a crime when they were, say, 17 years old.

This has been something that has been recognized as constitutional by the U.S. Supreme Court for many years; however, it is a practice that is not widely followed around the world. In fact, it's quite unusual, in my understanding of it, around the word.

Following the *Lawrence* decision in which the citation of foreign authority was made, a lower State court took it upon itself to decide, and I think not entirely unreasonably, that the overwhelming weight of international authority against the execution of juvenile offenders called for a re-examination of our law which allows the execution of juvenile offenders. That case is now pending in front of the United States Supreme Court. I would be very interested to see how that case comes out. If the Court reverses itself, if it feels obligated by the weight of international authority to change its own view not long ago stated of our Constitution, then I would say that is an example of quite a bit of ado about something, and I would recommend everyone keep an eye on that case.

Mr. CHABOT. Thank you. My time has expired.

The gentleman from Indiana, Mr. Hostettler, is recognized for 5 minutes.

Mr. HOSTETTLER. I thank the Chairman and I thank the panelists for your testimony today. It's been very enlightening.

And I appreciate your reference to the Federalists and the like and there is the idea of much ado about nothing and the fact that there is no problem of separation of powers here, and I guess if we do look to the Federalists, to the framers, we might suggest that you're probably right, that those—suggest that they're probably right. If I can quote Federalist No. 78: "Whoever attentively considers that different departments of power must perceive that in a

government in which they are separated from each other, the judiciary is beyond comparison the weakest of the three departments of powers. The judiciary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely judgment."

And so when we talk about much ado about nothing and the lack of separation of powers, there hasn't anything changed fundamentally in our government to allow the Court to have any active resolution whatever in any of these decisions that we're talking about. Is that not true?

Ms. JACKSON. Is that directed to me?

Mr. HOSTETTLER. Yes.

Ms. JACKSON. I think the Court is playing the role of judicial review that was contemplated at the founding and that it can only decide cases or controversies that are properly before it.

Mr. HOSTETTLER. But can take no active resolution whatever, and they actually end by saying "and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments?" So with what we're talking about here, the Supreme Court could opine all day long, referring to whatever foreign document they'd want to whatsoever, and, in fact, they have no means by which to enforce or execute their own judgment. Is that not true? And that's why the Judiciary Act of 1789 created the U.S. Marshal Service, an agency of the Executive Branch.

Ms. JACKSON. The courts depend upon the executive to enforce their judgments, and we have a very valuable, I would call it, rule of law tradition that the judgments of the Court are respected.

Mr. HOSTETTLER. But you will have to admit that that is not a blanket situation, that that does not happen, for example, with Cherokee Indian tribes and the desire by Chief Justice Marshall to seat Mr. Marbury and his associates, that that suggestion of a blanket enforcement by the Executive with regard to these decisions, that doesn't happen except with the acquiescence and the positive action of the Executive Branch; is that not true?

Ms. JACKSON. I think the United States has a stunningly good record of the respect for particular decisions of the Supreme Court once they are issued.

Mr. HOSTETTLER. Right.

Ms. JACKSON. And I think it would be a terrible thing to lose that. It is one of the things that distinguishes us from many other nations and a very valuable part of our constitutional heritage. The Court can only decide cases or controversies. Once those are decided within our tradition, the parties are bound, and the judgment is to be treated as at least resolving that dispute.

As Congressman Nadler's pointed out earlier, there are mechanisms to change the Constitution. They have been rarely invoked. Those are the legal mechanisms for change if a line of decisions is deemed unacceptable to a majority of the people.

Mr. HOSTETTLER. You're not familiar with the elimination of jurisdiction from the Supreme Court, the power, for example, of the purse not to fund the enforcement of decisions by the Court and others?

Ms. JACKSON. I am unaware of any part of the Constitution that specifically says Congress could refuse to fund decisions of the Court, although under the history of the U.S. Court of Claims, in fact, it was the case that judgments would be entered and sometimes the litigants would have to wait a while before Congress appropriated the money; but my understanding is that once the Court had finally decided an issue, under our system it was really the obligation of other branches to give effect to that judgment. And as I said, I think that would be an important part of our constitutional tradition that we should not lose.

With respect to *Marbury*, the judgment of the Court was respected, because the judgment of the Court was that it lacked jurisdiction to issue any relief. So there was no judgment for anybody else in the judgment to enforce.

I know that there are widely reported stories about the inefficacy of judgments issued in the Cherokee Indian cases in the early 19th Century, but I think those are generally regarded as a very limited and unfortunate, unfortunate, exception from our ordinary practice.

Mr. HOSTETTLER. May I have an additional minute?

Mr. CHABOT. Yes. By unanimous consent, the gentleman is granted an additional minute.

Mr. HOSTETTLER. If I can, Professor Ramsey, I think you have most succinctly put the situation as it is before us, and your written testimony reflects the dissenting opinion of Justice Scalia when you say, "The selectivity confirms that courts are not really being guided by foreign materials in their readings of specific texts, but are using foreign materials to support decisions of moral and social policy reached on other grounds." The justice put it this way: "It is clear from this that the Court has taken sides in the culture war."

So could you speak to the idea that Justice Scalia may have right concerns with regard to the future when he talks about "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, obscenity are likely sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by today's decision?"

Mr. RAMSEY. Well, I think some of those things are not widely practiced even in Europe, and so I think—my answer is it depends. Some of those practices, I think are perhaps somewhat on the nature of hyperbole, because they're probably things that would not come before the Court and probably would not require looking to international practices, but I think some of them are. I think that Justice Scalia has basically got it right here that the—that if the Court has an idea, if individual justices have an idea, of what they want to do in terms of moral and social practices, moral and social policy, and they can't find any support for it in U.S. law or in the values of Americans, that the use of foreign law gives them a whole other area to search for something that can support their opinion.

So I think that's the danger that Justice Scalia sees in it, that it opens up the discretion of our court to pick and choose among their favored policies. If I could just quickly add, I think, actually, there's an additional danger which Justice Scalia probably or at least may not agree with me on, but it's highlighted by my example

of the juvenile death penalty, that the Court having spent enough time relying on foreign sources, may suddenly find itself in a corner, that when foreign sources point unambiguously in one direction, the Court may feel compelled to follow them even if the Court left to its own devices wouldn't do that. I think that's the issue that's on the table in the juvenile death penalty, and I think then you would see a situation where the foreign sources were truly dispositive as opposed to being used to, as Justice Scalia says, buttress opinions arrived at for other reasons.

Mr. CHABOT. The gentleman's time has expired. The gentleman from Virginia, Mr. Forbes, is recognized for 5 minutes.

Mr. FORBES. Thank you, Mr. Chairman, and I thank all of you for being here.

Mrs. Jackson, I know that we've asked a lot of questions of you and you can fill this room with other professors or attorneys who would agree with you. You just happen to be the one here today. Since I only have 5 minutes, first of all, just the fact when we're talking about much ado about nothing, that normally is in the eyes of whoever is making that statement. I just cannot for the life of me think that these justices when they're quoting and citing these cases and sources, that they're either using them for persuasive ability themselves in reaching that decision or using them for pervasive ability for others to try to adopt their position.

I would just ask you this: Is there any country in the world today which you would be willing to say our courts should not look for interpreting our Constitution or our laws, the laws of that country?

Ms. JACKSON. Well, as I've tried to say, I think there are different kind of uses to be made, and if there are, for example, dictatorships that we don't want to be anything like and there is an aspect of their law that facilitates the dictatorship, I think it's perfectly fine for our justices to notice that and to say, as Justice Jackson did in his dissent in *Youngstown*, we do not want to be a place that has a feature like that which results in a dictatorship. So I have a hard—I think that the uses that can be made are so different in good judicial decision-making. I would tend to approach it in that way, what is the use, what are you trying to show by it.

Mr. FORBES. And forgive me for being short in my time, but would the answer be that there would be some countries that you would say they should not look to for interpretation of our laws in the United States?

Ms. JACKSON. There are some countries whose laws will not help us understand the positive meaning of our law.

Mr. FORBES. Let me give you this hypothetical: Suppose we have a country who was an enemy of the United States and adopted a written purpose that they were going to try to undermine the laws of the United States by undermining our Constitution. Would you agree with me, then, that we should not adopt the laws of that country for interpretive purposes for our Constitution and the laws in this country?

Ms. JACKSON. I don't think the Supreme Court adopts foreign law when it interprets the U.S. Constitution.

Mr. FORBES. Would you agree with me that they should not utilize that law for interpretive purposes for our laws in the United

States, be it persuasion for their decision-making or to persuade others to follow the decision they have made?

Ms. JACKSON. It is hard for me to imagine a hypothetical country that's set up in order to undermine another country. I've not seen that in my experience looking at other constitutions.

Certainly there will be legal institutions and laws in the world that are not going to have positive persuasive value. They may stand as negative precedents for how we should adjudicate.

Mr. FORBES. Who will make that determination?

Ms. JACKSON. The justices who are charged with interpreting the law in the course of cases properly within their jurisdiction.

Mr. FORBES. Will it be like an obscenity, they just know it when they see it?

Or maybe one of you would like to respond to that. My big concern is that there could very well be countries out there who are hostile to this country, and they may not actually adopt in writing that practice, but they may have it implied. How will our justices know who our enemies are today; will they be our enemies today; will they be tomorrow? When the decision was decided in that country, were they hostile or not?

Professor, if you would like to respond.

Mr. RABKIN. This is not hypothetical. It is not remote. It's not implausible. This is where we are right now. One of the main purposes of the European Union, as its advocates and sponsors have been saying for decades, is to allow Europe to stand up to the United States, to allow Europe to counterbalance the United States. It is implicitly hostile to the United States, and one of the things that it is really set on is undermining American sovereignty, because they think an independent American State, an independent American nation is dangerous and makes it harder for them to put over on the world things that they want to put over.

I think this is exactly to the point, and if I just could say it's easy to mock what I've said and make it sound hysterical. I'm not hysterical. I'm perfectly calm. I understand that we're going to have to live with them and so on and so on and so on, but they have an extremely different understanding of what constitutions are, of what constitutional review, and that goes along with their having this sort of, well, we're not exactly really sovereign, but we yield up our sovereignty to something that isn't itself sovereign. They like running the world in that way, and we stand for the opposite principle. We stand for other things too, but at this point, we stand for the opposite principle, and I think they are absolutely trying to infiltrate into our judicial system this idea that our judges need to listen to what their judges say, and we should say no to that.

Mr. FORBES. My time is up, but thank you.

Mr. CHABOT. The gentleman's time has expired.

Professor Jackson, it's my understanding you have to teach a class and you have to leave. We've got two Members, which will be 5 minutes each, and then the gentleman from California has asked for an additional 2 minutes. So it's like 12 minutes. Could you stick around for that long, or do you have to leave?

Ms. JACKSON. Yes, sir, I can. Thank you for your consideration.

Mr. CHABOT. Let me move to the gentleman from California who has asked for an additional 2 minutes, and he'll be granted that at this time.

Mr. SCHIFF. Thank you, Mr. Chairman. I appreciate it.

Professor Rabkin, it's not my desire to mock in my comments, but really the language that you use when you talk about an organized, systematic, pervasive effort, it sounds like an international judicial cabal of some kind, an international judicial conspiracy at work. You talk about it being subversive. You use words like "infiltrate," and given the already inherent hyperbole of the Congress, you're adding fuel to the fire.

Professor Ramsey says that this may not be a huge problem now, but there is a momentum in these things, small mistakes become magnified. Well, that applies to the Congress too. When we make small mistakes, they become magnified. When we establish a precedent of breaking down the independence of judiciary, it may be in a small form now, and here in this resolution, it may be in a much more significantly damaging form later.

I'd like to just conclude my remarks by quoting the Chief Justice's year-end report at the end of last year where Justice Rehnquist wrote that he wanted to focus on the relationship between the Judicial Branch and the Legislative Branch. During the last year, he wrote, "Tt seems the traditional interchange between the Congress and the Judiciary broke down when Congress enacted what is known as the Protect Act, making some rather dramatic changes to the laws governing the Federal sentencing process." He acknowledges it's well within the legislative function to do so, but he points out this act was enacted without any consideration of the views of the judiciary. "It is the Congress' job to legislate, but each branch of government has a unique perspective, and taking into account these diverse perspectives improves the process. Obtaining the views of the judiciary before the Protect Act was enacted would have given all Members of Congress the benefit of perspective they may not have been aware of on this aspect of legislation and other aspects that deal with the delicate process judges understand well."

Finally, he concludes: "Judges have a perspective on the administration of justice that is not necessarily available to Members of Congress and the people they represent. Judges have again by constitutional design an institutional commitment to the independent administration of justice and are able to see the consequence of judicial reform proposals that legislative sponsors may not be in a position to see. Consultation with the Judiciary will improve both the process and the product."

And I don't think there's been any consultation with the courts on this issue, and I think this is just another illustration of what the Chief Justice wrote not 14 years ago or 15 years, but, in fact, wrote just a few months ago. I think we would all be well advised to take the Chief Justice's admonition into mind and work to improve our communication and not take gratuitous shots across the bough.

Mr. CHABOT. The gentleman's time has expired, but if the professor would like to respond.

Mr. RABKIN. Yeah. What you quoted there is Rehnquist saying don't change the law in ways that will affect the Judiciary without

consultation. This resolution is not changing the law. It is expressing a philosophical viewpoint, and I think the philosophical viewpoint of the Congress is not going to change because of consultation. The Congress believes what it believes, which happens to be what the country believes, and if you and the courts believe otherwise, okay; you express yourselves.

Mr. SCHIFF. And, professor, you think that the combination of this effort, the threat of subpoenaing a Federal judge for his sentencing records——

Mr. RABKIN. That's something else. I wasn't testifying on that. I don't know about that.

Mr. SCHIFF. The cumulative impact, you don't think has chilling impact on the independence of the Judiciary?

Mr. RABKIN. I don't know about the other things, but this seems to me extremely sensible, and this is the thing which we're testifying about.

Mr. CHABOT. The gentleman's time has expired.

I'd ask unanimous consent that the gentleman from Virginia, Mr. Goodlatte, who is a Member of the overall Judiciary Committee be granted 5 minutes to ask questions, and he's recognized.

Mr. GOODLATTE. Mr. Chairman, thank you very much. I want to thank you and the other Members of the Subcommittee for your forbearance in allowing me to testify. This is an issue in which I have great interest and was pleased to introduce along with my colleague and good friend Congressman Feeney, this resolution, and I by no means think this is much ado about nothing.

I would say to the gentleman from California that, quite right, there should be great consultation between the Congress and the Judiciary on matters that are of mutual concern, and I would welcome the opportunity if this Subcommittee or the full Committee were to invite Justice Rehnquist and the other justices of the court to come down and have a discussion with us about these very important issues. I presume that these are issues that are not a matter of being much ado about nothing; otherwise, a very intelligent member of the Supreme Court like Justice Breyer would not have included such surplusage in his opinion if he thought it was much ado about nothing. I presume that Justice Scalia did not think it was much ado about nothing if he felt that it was of such great significance that a decision of the Court, which was having great difficulty finding anchor in any language in U.S. Constitution or any laws passed by the Congress to anchor that decision, would point out that reliance was made in interpreting our Constitution upon the views and decisions of other courts.

And I am especially concerned when justices go even further as Justice O'Connor went when she stated in a speech last year that, "I suspect that over time, the United States Supreme Court will rely increasingly, rely increasingly, on international and foreign courts in examining domestic issues."

So I think the Congress is quite right to catch this at an early stage when it is perhaps used in limited fashion by the courts, but clearly in such a way that many members of the Court—I understand six members of the Court have indicated a desire to do this further in the future.

Let me ask you, Professor McGinnis, you bring up a very important point in your testimony that the Constitution is unique and special because its authority is derived from the people of the United States of America. In your opinion, when the courts use foreign laws to interpret the U.S. Constitution, does it in effect weaken the authority of the Constitution by supplementing the will of the American people for the will of the foreign governments?

Mr. MCGINNIS. I think over time, it's not so much the substitution of the will, but I think it dissolves—it's a danger of dissolving the affections that Americans have for their own Constitution. Constitutionism has a great problem.

Who is going to defend the Constitution? Madison tried to focus on this. He thought that citizens aren't going to simply defend it out of their own interests; they have got to have some affection for it. And one of the things that creates affection for the Constitution is it's their Constitution, and if systematically over time the Supreme Court relies, as you quite correctly say that Justice O'Connor suggests, increasingly on other law, I think that starts to dissolve these crucial bonds.

So I think that is one of the really long-term dangers of the trend that is beginning.

Mr. CHABOT. Well, thank you. And one of the things that concerned me, I found striking the language that Congressman Hostettler read from Federalist Paper 78 about our Founding Fathers' perception of what the power of the Judiciary would be, and I think today we would find it equally striking to us that they would have such distant and remote view compared to the actual power that the Judiciary exercises today. And one of the issues that is underlying this resolution and I suspect future clashes, if you want to call it that, between the Congress and Judiciary is the question of whether the Founding Fathers, having taken that view, really placed in our Constitution enough checks and balances on this power or whether it's simply a failure of the Congress and the Executive Branch to act in response to the acquisition of power that has taken place on the part of our Judiciary, not to simply interpret the laws and fairly resolve disputes between parties, which I think they clearly contemplated and which I think every Member of this panel would say they clearly contemplated, but to take it further, to actually rewrite our laws and effectively finding in our Constitution things that the vast majority of the American people do not find.

So I would express my concern and ask any member of the panel if they have any thoughts on what measures the Congress could take to effectively exercise that system of checks and balances that is so clearly contemplated in our Constitution against abuse of power. Clearly, we've never removed anybody from office for misinterpreting in our view a section of the Constitution, and clearly we have never taken the steps that have been discussed by others, and perhaps we could, but they are very difficult steps.

Are there other things that we should be looking at to check unbridled power on the part of the Court?

Mr. CHABOT. The gentleman's time has expired. The panel, any members that would like to address that, can. I would ask them if they could please be brief. We've got one more questioner and

we've got a vote on the floor. So we're going to have to leave here shortly. So any of the members who would like to address that.

Professor Ramsey.

Mr. RAMSEY. Yes, very quickly, and I think this responds to some of the concerns that have been expressed by others. I think that the greatest check on the courts is that the courts must not only make decisions, but they must explain their decisions in rational discourse that is publicly available for criticism by all and that the public is, indeed, invited to criticize what the Court has said that it is doing.

Mr. GOODLATTE. Just as we are doing today?

Mr. RAMSEY. Yes, exactly, and I think that that's why I think that this measure is entirely an appropriate exercise of Congress' power and is not a violation of separation of powers as some have suggested. When editorial writers, when law professors, and when members of other branches of the Government take up the things the Supreme Court has written to justify their decisions and say this does not seem like an adequate justification to us, that is one of the great checks in our system we have on courts.

Mr. CHABOT. Any other comments from the panel? Professor?

Ms. JACKSON. I want to express agreement with the importance as a check, of the giving of public judgments and reasons, which not only Members of Congress can criticize, but newspapers and ordinary citizens, and I want to raise a grave caution about the idea that the impeachment power ever would be used because of disagreement with a decision. Again, removal of judges whose decisions the Government doesn't like is a characteristic of countries that I don't think we want to move our system towards, and the protection of the independence of the Judiciary, whether we agree or disagree with their decisions, is something I think is very important.

Mr. CHABOT. Thank you.

The gentleman's time has expired. The last questioner this afternoon will be the gentleman from Alabama, Mr. Bachus, who is recognized.

Mr. BACHUS. Thank you.

Let me say that I am enthusiastically for this resolution, and I commend the gentleman from Virginia.

Professor Jackson, one thing that I'm curious about, when I talk to my constituents when they talk about this issue, and you talk about a foreign law, let's just say a law in Germany, none of my constituents elect those legislative bodies. They don't have one vote. They don't have one iota of influence in that legislative process.

Isn't that really the essence of democracy? We elect our Representatives, our Congressmen, our State legislators to make laws for us. The German law is made by Germans, people that were elected or appointed by Germans. Isn't that a cause of concern to you that our courts would be citing decisions where there is no input by our voters? Isn't the vote what this country has, our democracy?

Ms. JACKSON. If the Court were treating a foreign law as binding, I would agree this raises very serious questions of democratic self-governance.

Mr. BACHUS. Well, let me ask you this: Why would the court even refer to a law in a decision, a foreign law, "a foreign law?" Why would it even be in the opinion if they weren't focusing on it?

Ms. JACKSON. Well, sometimes the Court, as I mentioned earlier, looks at foreign law to say we don't want to be like that; we're different from that; we can learn.

Mr. BACHUS. What if they looked at it and——

Ms. JACKSON. If they looked at it and said, "We protect liberty and so does the European Court of Human Rights——"

Mr. BACHUS. But don't we have enough laws here without looking at some foreign laws that were formed by people that weren't elected, weren't appointed by Americans?

Ms. JACKSON. We do have a lot of law here, and the great bulk of the opinion of the Supreme Court in *Lawrence* v. *Texas* involves discussion of U.S. cases, Federal cases, and also of State cases.

Mr. BACHUS. But in *Lawrence*, you bring up in *Lawrence*. In *Lawrence*, they reversed what had been a long-standing law. They reversed an opinion, and they did so and they cited a foreign case. You say it wasn't persuasive. Why did they bring it up if they weren't focused on it?

Ms. JACKSON. Well, actually the decision——

Mr. BACHUS. Was it irrelevant?

Ms. JACKSON. No. The decision that they reversed, which was *Bowers* v. *Hardwick*, in that case, the Chief Justice, one of the judges in the majority, had actually referred to what western civilization did as part of the basis for his thinking in the earlier case to uphold the sodomy laws. So, in part, the *Lawrence* v. *Texas* decision citation to Europe was to say *Bowers* v. *Hardwick* misunderstood what western civilization and Europe was about, and in that sense, sort of cleaning up the record for accuracy, it's seems entirely appropriate.

Courts refer to a lot of material that is not binding as such, but which helps them understood the issue before them.

Mr. BACHUS. But that's my very point. It's influencing them, and it shouldn't, and let me say this: If you ask one of your students what is the real estate law, what is the issue on this that you're teaching, and they came back to you and quoted foreign—would you prefer that they quote American law or German law?

Ms. JACKSON. They need to know American law. If we're training them in American law schools, there's no question.

Mr. BACHUS. Right.

Ms. JACKSON. But if the question is how to decide an unsettled issue in the State of New York, for example, it would be good lawyering for them to say, "Well, even though voters in Minnesota don't vote in New York, let's see how they did it there."

Mr. BACHUS. Yes.

Ms. JACKSON. Maybe we'll agree. Maybe we'll disagree. But that tradition of looking to compare law——

Mr. BACHUS. But that's because they are under the same constitution, the U.S. Constitution.

Ms. JACKSON. That's right.

Mr. BACHUS. They're not under some——

Ms. JACKSON. That's correct, but we see the State courts doing this all the time when they're interpreting their State constitutions.

Mr. BACHUS. Wouldn't you prefer—if you gave a student, you told them to respond in 300 words, wouldn't you prefer an all-American response?

Ms. JACKSON. It depends what the question was. I would certainly want my student to know American law.

Mr. BACHUS. Well, I will tell you that the voters elect 100 percent American legislators. You know, I don't have a constituent or a voter that votes German. We're interested in American law, and I think it's a terribly dangerous trend. I think it undermines our democracy.

Mr. CHABOT. The gentleman's time has expired.

I want to thank the panel for very enlightening testimony here from all four of the members. We appreciate it very much.

As I had said earlier, all Members would have 5 days to supplement their remarks, and the gentleman from Virginia's opening statement will be entered for the record.

If there is no further business to come before the Committee, we're adjourned. Thank you very much.

[Whereupon, at 12:53 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE J. RANDY FORBES, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, I thank you for holding this hearing today. It is important that we examine this issue because with growing frequency, the Supreme Court of our country is quietly undermining the sovereignty of our nation. Our Court is turning beyond our borders, and beyond the laws of our land, to decisions of foreign judicial tribunals when deciding American constitutional and statutory cases. Six of the nine Supreme Court justices have written or joined opinions that cited foreign authorities to justify their decisions. Lower Federal courts are beginning to follow this disturbing trend.

Article VI of the Constitution clearly states that the Constitution and federal statutes are the supreme law of the land. As a Member of Congress I swore an oath to defend the Constitution and pass laws that respect it; each of our Supreme Court justices also raised their right hand and swore an oath to defend the Constitution and interpret the law in a manner that preserves it.

In a case focusing on allowable delays of execution *(Knight* v. *Florida)* Supreme Court Justice Stephen Breyer said he found "useful" court decisions on the matter in India, Jamaica, and Zimbabwe.

Will he also find useful Zimbabwe law when interpreting the First Amendment? Last month Zimbabwe's highest court upheld a law requiring all journalists to be licensed by the government or face criminal charges. The law says that any journalist who works without a license from the state-appointed Media and Information Commission can be prosecuted, and may face up to two years in prison if found guilty. Dozens of journalists have been prosecuted under the Act, which has also been used to prevent publication of Zimbabwe's only major independent daily newspaper, *The Daily News.*

If the Supreme Court of the United States is insistent on citing foreign laws to justify their activist opinions, at the very least, they ought to tell us which foreign laws they like and which ones they don't like. Do we adopt the law of countries hostile to the U.S.? Do we adopt only the laws of our friends? What about those friendly today and hostile tomorrow?

What will be next? Will the Supreme Court look to the Netherlands when deciding our drug laws? In Saudi Arabia laws on marriage say a man is legally entitled to up to four wives. Will our justices be influenced by those laws?

The constitutions of India, Jamaica, Germany, and France are younger than I am. The Constitution of Zimbabwe is younger than my son. Why would we look to the laws of other countries when our Constitution is the longest working constitution in the world? Our Constitution was adopted by our founding fathers, defended by our mothers and fathers, and protected today by our sons and daughters. Our Constitution is interpreted and given life by our legislatures and judges either appointed or elected by citizens of our country based on the laws of our country. Throughout 200 years, it has withstood civil war, world war, natural disaster, and political turmoil. It is the fortress that protects the freedoms that we all too often take for granted.

I have joined with Congressman Bob Goodlatte and Congressman Tom Feeney to cosponsor the resolution before the Subcommittee today. The Reaffirmation of American Independence Resolution expresses the outrage of the American people at being made subject to the laws of foreign countries—countries where laws are not made through elected representatives of the American people, let alone even crafted through a democratic process. The resolution will reaffirm what our founding fathers made clear: the laws of dictators and tyrants will not govern America. With

its passage, this resolution will reaffirm our nation's dedication to our sovereignty, to our people, and to the principles upon which we were founded.

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, thank you for holding this important hearing.

Recently there has been a deeply disturbing trend in American jurisprudence. The Supreme Court, the highest court in the land, has begun to look abroad, to international law instead of our own Constitution as the basis for its decisions. In fact, six of the court's nine justices have either written or joined opinions that cite foreign authorities.

Supreme Court Justice Sandra Day O'Connor recently made a troubling prediction that the Supreme Court will rely "increasingly on international and foreign courts in examining domestic issues . . . ," as opposed to our Constitution, as the basis for its rulings.

Several western nations have begun to rely upon international conventions and U.N. treaties when interpreting their own constitutions, which is a frightening prospect, given that most of these materials are crafted by bureaucrats and non-governmental organizations with virtually no democratic input. The new Supreme Court trend to cite these types of foreign authorities is a threat to both our nation's sovereignty and the democratic underpinnings of our system of government. Our nation's founders were well aware of this danger when they drafted the declaration of independence, which declares that King George had "combined to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws."

The Supreme Court's trend is particularly troubling because it comes at a time when the court is deciding such fundamental issues as the very wording of the Pledge of Allegiance, the meaning of the first amendment, and other issues that are uniquely American. Our nation's judges, and Supreme Court justices, took an oath to defend and uphold the U.S. Constitution—and it is time that Congress remind these unelected officials of their sworn duties.

That is why I joined with my friend and colleague, Congressman Tom Feeney, to introduce the Feeney/Goodlatte resolution, which expresses the sense of Congress that the Supreme Court should not cite foreign authorities in its opinions when it interprets the U.S. Constitution and legislation passed by U.S. legislatures. This resolution sends a clear message that the Congress is not willing to simply stand idly by and see our nation's sovereignty weakened.

I believe the judicial branch is guaranteed a very high level of independence when it operates within the boundaries of the U.S. Constitution. However, when judges and justices begin to operate outside of those boundaries, Congress must respond. We must be steadfast guardians of the freedoms that are protected in the Constitution of the United States of America.

PREPARED STATEMENT OF THE HONORABLE TOM FEENEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Increasingly Federal Judges, including 6 U.S. Supreme Court Justices, have expressed disappointment in the Constitution we inherited from the framers, and disdain for certain laws enacted by democratically elected Representatives. With disturbing frequency, they have simply imported law from foreign jurisdictions, looking for more agreeable laws or judgments in the approximately 191 recognized countries in the world. They champion this practice and fancy themselves players on the international scene of jurisprudential thought. In their recent speeches, several Justices have referred to the "globalization of human rights" and assuming a "comparative analysis" when interpreting our constitution. Is this a proper role for our United States judges?

Mr. Goodlatte, Mr. Ryun, and I hope to have a great civics debate on the Constitutionally Appropriate role of judges in our Republic. This is why we asked Chairman Chabot to conduct hearings on this subject.

The Framers of the U.S. Constitution certainly understood that America had to take its place in the International community. They provided a blueprint for how our government should build relations with other nations. In Article VI, they provided that treaties made pursuant to the U.S. Constitution would be the "Supreme law of the land." Congress was given the power to remedy "offenses against the law of nations" in Article 1, Section 8. In Article II, they gave the President the power to make treaties with the advice and consent of the Senate. Furthermore, the Founders created our Legislative process as the people's body. If our constituents

believe that the laws of another nation are superior to our own or inform us as to a better approach to an issue, they have the right to bring that idea to the attention of their respective representative and let the idea go through the legislative process.

The Framers, in our brilliant Constitution, established a fine balance to protect American Constitutional Democracy. They carefully separated the legislative branch's role from the judicial one, making clear that while judges interpret the law and apply it to individual cases and controversies; only the legislature is empowered to "create law." For example, in explaining the Constitution to the American people in Federalist 47, Madison approvingly quotes Montesquieu: "Were the powers of judging joined with the Legislative, the Life and Liberty of the Subject would be exposed to the Arbitrary Control, for the Judge would then be the Legislator."

In the Declaration, Jefferson and the Founders explained the rational for war against the King in part by saying, "He has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws." And yet, increasingly American judges at the highest levels of the federal judiciary cannot resist rationalizing otherwise baseless interpretation of American law by reference and incorporation of international law.

Justice Ginsburg recently quoted the phrase from the Declaration that says, "A decent respect to the opinions of mankind requires that they should declare the causes which impel them to the Separation" as justification for the Court's broadening of their judicial horizons to include comparative law in their opinions. However, this statement unbelievably misses the point our Founders were making when deciding to separate from the "Old World." The Declaration declares our independence from England. From our inception we chose to separate from other nations. This is a part of our heritage. We did this because we viewed the way other nations were governed and ruled and decided it was not the way America should be governed and ruled. People came to this country as the "New World," to leave the traditions and oppression of the "Old World." We are a nation unlike any other and our judges misunderstand our very foundation when they believe that we need to look to the "international consensus." Importing foreign laws directly contradicts the spirit of the Declaration of Independence.

In Federalist 78, Hamilton cited Montesquieu, "There is no liberty, if the power of judging be not separated from the Legislative and Executive powers."

Lincoln in his Inaugural speech, critiqued the Infamous Dred Scott Decision of the US Supreme Court when he said, ". . . The candid citizen must confess that if the policy of the government upon vital questions, affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court . . . the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal. . . ."

Article VI of the U.S. Constitution clearly provides in the Supremacy Clause, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; And all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land."

It is in this context that I am alarmed that 5 Justices in the Lawrence v. Texas case, imported recent foreign law to interpret our over 200 year old Constitution.

In a case focusing on allowable delays of execution (Knight vs. Florida) Supreme Court Justice Stephen Breyer said he found "useful" court decisions on the matter in India, Jamaica, and Zimbabwe.

Will he also find useful Zimbabwe law when interpreting the First Amendment? As Congressman Randy Forbes points out, "Last month Zimbabwe's highest court upheld a law requiring all journalists to be licensed by the government or face criminal charges. The law says that any journalist who works without a license from the state-appointed Media and Information Commission can be prosecuted, and may face up to two years in prison if found guilty. Dozens of journalists have been prosecuted under the Act, which has also been used to prevent publication of Zimbabwe's only major independent daily newspaper, *The Daily News*."

Justice Sandra Day O'Connor, while she did not join in the majority reasoning of Lawrence, said in a recent speech "I suspect that over time [the U.S. Supreme Court] will rely increasingly . . . on international and foreign courts in examining domestic issues." According to the *Atlanta Journal-Constitution*, Justice O'Connor also stated that the U.S. judiciary should pay even more attention to international court decisions than it already does.

Justice Breyer declared that "comparative analysis emphatically is relevant to the task of interpreting constitutions and enforcing human rights." He then concluded that nothing could be "more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us?" In conclusion he quoted Wordsworth's poem on the French Revolution, hoping it will "still ring true," when Wordsworth wrote, "Bliss was it that dawn to be alive but to be young was very heaven." My

recollection is that the French Revolution produced little "Liberte," but much bloodletting.

In a speech by Justice Ginsburg, August 2, 2003 to the American Constitution Society entitled "Looking beyond our borders: The Value of a Comparative Perspective in Constitutional Adjudication," she derided as outdated the Historical Jurisprudential view that reviewing the founding fathers references to foreign systems was useful in writing our Constitution, but contemporary foreign laws or constitutions is irrelevant to interpreting our own.

Justice Ginsburg approvingly cited cases where the U.S. Supreme Court Majority cited "the world community" to support its interpretation of the Constitution.

In acknowledging our great traditional jurisprudence she said that "hardly means we should rest content with our current jurisprudence and have little to learn from others. . . ."

She had two suggestions. One, we need to have more "dynamism with which we interpret our Constitution." I ask, what does this mean? Apparently, Madison and the framers were insufficiently "dynamic" for Justice Ginsburg. Her second suggestion was that we need to have more "extraterritorial application of fundamental rights." This sort of universal Jurisdictions have led Courts of other Countries to entertain criminal indictments as war crimes against President Bush I, Tony Blair, Colin Powell, and Wesley Clark, among others.

She concluded by bragging that our "island" or "lone ranger" mentality is beginning to change. She does not say what Constitutional amendment process, or what legislatively enacted law by elected Representatives permits this judicially imposed Constitutional transformation; Only that "Our Justices" are becoming more open to comparative and international law perspectives. Justice Breyer echoed the same position in a speech to the American Society of International Law when he said, ". . . [W]e find an increasing number of issues, including constitutional issues, where the decisions of foreign courts help by offering points of comparison. This change reflects the 'globalization' of human rights. . . ."

Finally, I disagree with these Justices' newly created approach to interpreting American domestic law because if our Judges create law on Constitutional rights by use of foreign laws, they violate the Constitution many ways, including:

- Article I—placing lawmaking power solely in Congress
- Article II—Providing Presidential power to veto law
- Article II—Providing the President power to make treaties and the Senate the power to Advice and Consent
- Article IV—Guaranteeing all Americans a Republican form of Government (meaning they get to elect their lawmakers)
- Article V—Proper way to amend our constitution
- Article VI—The Supremacy Clause of the U.S. Constitution

Additionally, the civil rights lose the ability to control the laws we are governed by casting their vote for their elected representatives, who make laws. They have NO vote when laws are made by judges who judicially import law.

As Professor Jeremy Rabkin stated in his book, "Sovereignty Matters," Constitutionalism is about legal boundaries. Because the United States is fully sovereign, it can determine for itself what its Constitution will require. And the Constitution necessarily requires that sovereignty be safeguarded so that the Constitution itself can be secure." Judges take an oath to protect and defend the Constitution, not to protect and defend international law or the laws of Canada or India. They have a duty to ensure our nation's sovereignty is protected.

As the great statesman Daniel Webster famously said, "Hold on, my friends, to the Constitution and to the Republic for which it stands. Miracles do not cluster and what has happened once in 6,000 years, may not happen again. Hold on to the Constitution, for if the American Constitution should fail, there will be anarchy throughout the world."